80-1507

No. .....

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ALEXANDER L. STEVAS,

In the Supreme Court of the United States

October Term, 1980

THE CITY OF PARMA, OHIO *et al.* and THE CITY OF LAKEWOOD, OHIO *et al.*,
Appellants,

v.

RECORD REVOLUTION, NO. 6, INC. and ALEXANDER J. LUKA d/b/a DAYSTAR BOUTIQUE,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

1. The Model Drug Paraphernalia Act, as promulgated by the Drug Enforcement Administration of the United States Department of Justice and adopted by appellants herein, defines "drug paraphernalia" as all equipment, products and materials of any kind which are used, intended for use, or designed for use in connection with a controlled substance. The first question presented is whether the phrase "designed for use" is so vague or overbroad as to render the definition and, hence, the entire Model Act unconstitutional.

2. The definition portion of the Model Drug Paraphernalia Act contains a listing of a variety of items which may be illicit if the requisite criminal intent is also present. The question presented is whether the terms "roach clips" and "miniature cocaine spoons", as contained in that listing, are so vague as to render the definition and, hence, the entire Model Act unconstitutional.

3. The definition portion of the Model Drug Paraphernalia Act contains a listing of factors which, in addition to all other logicially relevant factors, should be considered in assessing whether a defendant has the requisite criminal intent. The question presented is whether those factors expressly stated in the listing are so overbroad as to render the definition and, hence, the entire Model Act unconstitutional.

4. The Model Drug Paraphernalia Act makes it unlawful for any person to place any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. The question pre-

sented is whether, in view of the territorial and constitutional restrictions inherent in municipal legislation generally and in these ordinances specifically, this prohibition impermissibly violates First Amendment rights.

PARTIES TO THE PROCEEDINGS BELOW

Three cases were consolidated for hearing in the Court below.

Appellant in the first case was Record Revolution No. 6, Inc. Appellees were: The City of Parma, Ohio; the Council for the City of Parma, Ohio; John Petruska (Mayor); Andrew Boyko (Law Director); Kenneth G. Kuczma, Victor J. Labutta, Frank J. Houdek, Jack P. Krise, Jr., Joseph A. Molodec, Evelyn M. Kopchak, Gerald M. Boldt, Edward Lonjak, Doris P. Krawczyk, and William R. Obuch (Council members); Francis Szabo (Police Chief).

Appellant in the second case was Alexander J. Luka d/b/a Daystar Boutique. Appellees were: The City of Lakewood, Ohio; the Council for the City of Lakewood, Ohio; Anthony C. Sinagra (Mayor); William E. Blackie (Law Director); Thomas O. McBride, John G. Salmon, Edward M. Graham, John P. Gallagher, Thomas C. Brown, William F. Chinnock, Trudy Wendling (Council members); Charles Petro (Police Chief).

Appellant in the third case was The Right Place, Inc. Appellees were: The City of North Olmsted, Ohio; the Council for the City of North Olmsted, Ohio; Robert W. Swietyniowski (Mayor); Michael R. Gareau (Law Director); Donald P. Albenze (Prosecutor); Marion R. Taylor (Police Chief). This third case is not being appealed before this Court.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

These appeals are prosecuted by the City of Parma, Ohio and the City of Lakewood, Ohio, and their respective officials, from final judgments of the United States Court of Appeals for the Sixth Circuit, reversing judgments entered in their favor by the United States District Court for the Northern District of Ohio. As the two cases involve identical questions and were consolidated by the Court of Appeals, a single jurisdictional statement is submitted in accordance with Rule 10.6 of this Court.

THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been officially reported but appears in the Appendix, p. A1.

The opinion of the United States District Court, Northern District of Ohio, for the City of Parma case, is officially reported at 492 F. Supp. 1157 (1980), and further appears in the Appendix, p. A54. The District Court opinion for the City of Lakewood case has not been officially reported but appears in the Appendix, p. A103.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On January 7, 1980, the City Council of Parma, Ohio enacted its Ordinance No. 242-79; on January 21, 1980, the City Council of Lakewood, Ohio enacted its Ordinance 5-80. As subsequently amended, the two ordinances are the same in almost all respects; and both are virtually identical to the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration of the United States Department of Justice.

The initial action was filed in the District Court for the Northern District of Ohio by Record Revolution, No. 6, Inc., against Parma and its officials, pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202; it challenged the constitutionality and sought declaratory and injunctive relief against enforcement of the Parma Ordinance. Following a hearing on the request for permanent injunction, the District Court concluded that Parma Ordinance 242-79 is constitutional as construed by that Court; and it entered final judgment for the defendants.

Thereafter, a second action was brought by Alexander J. Luka, before the same court, against Lakewood and its officials, pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202; he also challenged the constitutionality and sought declaratory and injunctive relief against enforcement of

the Lakewood ordinance. On the basis of the Court's prior decision in the Parma case, the District Court entered final judgment for the defendants.

An appeal was taken in both cases to the United States Court of Appeals for the Sixth Circuit; and the two cases were consolidated, together with a third case not presently before this Court. The Appeals Court reversed the District Court in a judgment entered December 8, 1980. A notice of appeal to this Court was filed on February 4, 1980, in the Court of Appeals for the Sixth Circuit.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2). *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . . .

Fourteenth Amendment, United States Constitution:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Parma Ordinances 242-79 and 103-80 and Lakewood Ordinances 5-80 and 29-80 are set forth consecutively in the Appendix, beginning at p. A119.

STATEMENT OF THE CASE

In the fall of 1979, the Drug Enforcement Administration of the United States Department of Justice, at the request of the President, drafted a "Model Drug Paraphernalia Act" (Model Act) as a proposal for states and municipalities across the country to adopt in coping with the paraphernalia problem. The Cities of Parma and Lakewood, Ohio were among the first in the country to do so.

The Model Act can best be understood when viewed in four essential parts. First, there is a definition which provides that " 'drug paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use" in connection with a controlled substance. Second, as a part of the definition, there is a list of many common forms of property that can be paraphernalia if "used, intended for use, or designed for use" to violate drug laws. Third, as a part of the definition, the Act sets out several relevant factors to be considered in determining whether the necessary criminal intent is present, so as to constitute an object as illicit paraphernalia. Finally, there are substantive offenses, essentially prohibiting the possession, manufacture, or delivery of paraphernalia. In the case of manufacture or delivery, it is specifically provided that no person do so knowing, or under circumstances where one reasonably should know, that the paraphernalia will be used in connection with a controlled substance. It is further made unlawful for any person to place any advertisement knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

The Parma Ordinance was the first to be challenged, by a broad complaint alleging, *inter alia,* that the Ordinance is vague and overbroad under the Due Process Clause of the Fourteenth Amendment and that the advertising prohibition is violative of the First Amendment. Unrebutted testimony at the hearing for permanent injunction was that a law such as the Parma Ordinance would assist in law enforcement efforts against drug abuse. Extensive testimony was elicited by plaintiff as to how various witnesses would interpret or apply the Ordinance; however, this evidence was rejected by both the trial court, 492 F. Supp., at 1168, and the appeals court, Slip Op., at 22, n.15, on the theory that the Ordinance speaks for itself. The evidence did not disclose any specific design characteristic which could consistently be attributed to any particular type of drug paraphernalia.

The trial court construed each of the three elements of the definition, "used, intended for use, or designed for use," as implying and requiring a general criminal intent on the part of a defendant. 492 F. Supp., at 1169. This criminal intent is what separates the innocuous object from the illicit paraphernalia. 492 F. Supp., at 1166. And, since each of the substantive offenses relies on the term "drug paraphernalia," that criminal intent is also made an element of the mental state required to convict under any offense. 492 F. Supp., at 1167. In particular, the trial court held that an item is designed for use with drugs if the defendant intentionally designed or adapted the item for use with drugs. 492 F. Supp., at 1170, n.5.

With regard to the list of items which may be paraphernalia, the trial court held that none of the items is *per se* drug paraphernalia; rather each item becomes paraphernalia only if the requisite intent is present. There was no finding of vagueness since all the terms listed in "subpart L" are generic examples of what commonly are used with controlled substances but are not illicit unless

criminal intent is shown beyond a reasonable doubt. 492 F. Supp., at 1170-1, n.6.

In the case of the indicia of criminal intent, the trial court held all but one to be valid, to the extent applicable rules of evidence would permit their use. The sole factor which he held to be vague he ordered severed from the Ordinance.

As for the substantive offenses, the trial court held that the combined requirements that the City prove both a general criminal intent, by virtue of the definition, and actual knowledge by the seller of the ultimate use of an object he distributes save the Ordinance from claims of vagueness. In doing so, however, he ordered that the "reasonably should know" standard be stricken from the substantive offenses. 492 F. Supp., at 1175, 1173.

Finally, with regard to the prohibition on advertising, the trial court held that the speech which the Ordinance restricts is not constitutionally protected, and further held that the territorial limitations inherent in the City's authority compelled a restrictive view of the intended scope of the Ordinance. Therefore, this restriction was not overbroad. 49 F. Supp., at 1178-9.

In sum, the trial court held that, subject to its interpretation and the severance of the two provisions noted, the Parma Ordinance was constitutional. Subsequently, the City of Lakewood amended its Ordinance to reflect the deletions ordered by the court. Parma also deleted the single indicator of intent and the "reasonably should know" standard from one substantive offense; that standard was not deleted from the advertising prohibition.* In all other respects, the Ordinances are now the same.

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*Parma did not contest the trial court's ruling in this regard and does not do so before this Court. For purposes of this case, appellants concede the vagueness of the "reasonably should know" standard in the Parma Ordinance.

Following the decision in the Parma case, a second action was brought against enforcement of the Lakewood law, making the same allegations of unconstitutionality. No evidentiary hearing was held. The trial court also entered judgment in favor of Lakewood, based on its opinion in the Parma case.

On appeal to the United States Court of Appeals for the Sixth Circuit, the cases were consolidated and expedited. The District Court decisions were reversed and the case was remanded for issuance of a permanent injunction against enforcement of the Ordinances.

The Sixth Circuit first held that the terms "used" and "intended for use" were not vague or overbroad; however, focusing on the term "designed for use", the Court held that it referred, not to subjective intent, but to objective design characteristics. Since no such design characteristics were demonstrated at the trial level, this phrase was deemed vague and overbroad. Slip Opinion, at 26-7.

In dealing with the list of items which are common forms of drug paraphernalia, the Appeals Court agreed that the listing does not make the items *per se* paraphernalia; nevertheless, it held the terms "roach clips" and "miniature cocaine spoons" to be vague. Slip Op., 30.

With reference to the listing of logically relevant factors for determining what items are drug paraphernalia, the Court held that several factors listed create the possibility of convicting on the basis of guilt by association, and thus implied that they were unconstitutionally overbroad. Slip Op., 32.

Finally, with regard to the advertising restriction, the Court rejected the limitations inferred by the trial court and, therefore, held that the Ordinance unconstitutionally violates the First Amendment. Slip Op., at 38-9.

THE QUESTIONS ARE SUBSTANTIAL

The manufacture and merchandising of drug paraphernalia has become a multi-million dollar industry in this country which facilitates and glamorizes the use of controlled substances, most often preying on the drug fantasies of our nation's youth. Previous attempts by state and local authorities to control this problem through legislation were, in large part, unsuccessful when challenged on grounds of vagueness, overbreadth or a variety of other ingenious allegations. The Model Drug Paraphernalia Act, as drafted by the Drug Enforcement Administration of the United States Department of Justice, was painstakingly worded to deal with this problem while still carefully providing for the constitutional rights of paraphernalia devotees.

At the time of the District Court's opinions in the cases before this Court, there were no other authoritative court opinions considering the Model Act's constitutionality. However, on the strength of the trial court's well-reasoned interpretation, at least ten states and untold municipal legislatures have proceeded to adopt the Model Act. To date, at least six United States District Judges have held the Model Act to be constitutional. Four decisions have held the Model Act constitutional in its entirety. *Mid-Atlantic Accessories Trade Association v. Maryland,* No. H-80-1343 (D.Md. Nov. 11, 1980); *Florida Businessmen for Free Enterprise v. City of Hollywood,* No. 80-6157-Civ-NCR (S.D.Fla. Aug. 29, 1980); *Delaware Accessories Trade Assoc. v. Gebelein,* No. 80-285 (D.Del. Aug. 15, 1980); *World Imports, Inc. v. Woodbridge Township,* No. 80-1414 (D.N.J. June 8, 1980). The court in *The Casbah, Inc. v. Thone,* No. 80-0271 (D.Neb. Sept. 26, 1980), agreed with the court in the case at bar in holding the Act constitutional

with the same two deletions. And, in *Tobacco Accessories v. Treen,* Civil No. 80-3372 (E.D.La. Oct. 28, 1980), a Louisiana statute based on the Model Act was upheld.

The same district judge decided *Record Museum v. Lawrence Township,* 481 F. Supp. 768 (D.N.J. 1979) and *World Imports, Inc., supra.* Yet, in the former case, dealing with a locally-created law, the ordinance was held unconstitutional; in the latter, the Model Act was upheld. And, in *Geiger v. City of Eagan,* 618 F.2d 26 (8th Cir. 1980), dealing with a non-Model Act law, the Model Act was cited as an example of a properly drawn ordinance. 618 F.2d, at 28, n.4.

In sum, to date every court in the country which has considered the Model Act has followed the reasoning of the district court below—except the Sixth Circuit Court of Appeals.

Moreover, testimony presented in the trial court, and the judgment of legislators across the country, was that this Model Act would aid in the fight against the epidemic problem of drug abuse. Yet, enforcement of that Act is enjoined in Parma and Lakewood, and held in abeyance in countless other jurisdictions, on the basis of one uncorroborated decision.

Furthermore, appellants are informed that the Model Act is presently being considered by the Courts of Appeals for the First, Fourth, Fifth, and Eighth Circuits. In view of the unanimity of the district court decisions, the likelihood of a conflict arising among the Circuits would seem great. Certainly this is a situation which cries out for clarification by this Court, as the final arbiter among the Circuits; and appellants should not be penalized simply because they cannot presently point to the specific Circuit decision which will ultimately create the conflict with the Sixth Circuit.

Clearly then, this case is of such importance as to warrant plenary consideration by this Court.

But, in addition to the case's significance in presenting this Court with the opportunity to rule upon the Model Act, the individual issues are substantial and important in their own right and warrant this Court's consideration in full.

First, in *Bigelow v. Virginia,* 421 U.S. 809 (1975), this Court stated, at 825, 828:

> We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.
>
> * * * * *
>
> No claim has been made, nor could any be supported on this record, that the advertisement . . . related to a commodity or service that was then illegal in either Virginia or New York, or that it otherwise furthered a criminal scheme in Virginia.[14]
>
> * * * * *
>
> 14. We are not required to decide here what the First Amendment consequences would be if the Virginia advertisement promoted an activity in New York which was then illegal in New York. An example would be an advertisement announcing the availability of narcotics in New York City when the possession and sale of narcotics was proscribed in the State of New York.

This case squarely presents to the Court for review these questions, left unanswered in *Bigelow.* The decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights,* 413 U.S. 376 (1973), established the principle that advertising to promote illegal acts does not constitute protected speech. "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." 413

U.S., at 388. *And see, e.g., United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972). That principle formed the basis for the decision of all the courts which have upheld the Model Act's prohibition on placing an advertisement to promote the sale of paraphernalia.

And, using the Virginia-New York analogy of the Court, this case does present the situation in which the activity promoted is illegal in Virginia (Parma) and may well be illegal in New York (Lakewood, for example). In other words, if the Court of Appeals was correct in refusing to adopt the limiting construction of the Ordinances urged by both the Cities and the district court, then this Court is plainly faced with the questions left open in *Bigelow* as to how far jurisdictions may go in legislating against advertising which promotes illegal acts, as they are entitled to do under this Court's teachings in *Pittsburgh Press.*

The Sixth Circuit's interpretation that the phrase "designed for use" necessarily refers to design characteristics which can objectively be discerned also raises a substantial question. Specifically, that interpretation directly contravenes the decision of this Court in *Danovitz v. United States,* 281 U.S. 389 (1930). *Danovitz* was a forfeiture action under the National Prohibition Act for items designed for the manufacture of contraband liquors. In upholding the forfeiture, this Court refused to divorce the product from the intent of the purveyor.

> . . . [I]f the empty containers and other objects seized were offered for sale in such a mode as purposely to attract purchasers who wanted them for unlawful manufacture, as we interpret the word, they were designed for that manufacture and could be seized. 281 U.S., at 397.

An entire line of cases from the Prohibition era relied on that interpretation by this Court. *See United States v. 2265 One-Gallon Paraffined Tin Cans,* 260 F.2d 105, 108-9 (5th Cir. 1958), and cases cited therein. Consistently, the terms "intended" and "designed" have been used in tandem to refer to the purpose of the vendor accused. *See, e.g., United States v. Brunett,* 53 F.2d 219, 231 (W.D. Mo. 1931). And the rationale behind that interpretation has been very simply explained:

> It seems to me that whatever difference there may be in the meaning of the words "designed" and "intended" is fully explained by the multiplicity of subjects which the two adjectives serve; it being more natural to say that a still is designed for the manufacture of unlawful liquor, and that a preparation or compound is intended for use in the manufacture of unlawful liquor. *Stroh Products Co. v. Davis,* 8 F.2d 773, 777 (E.D.Mich. 1925).

Moreover, in refusing to apply this common sense approach, the Sixth Circuit not only challenges *Danovitz,* and the Prohibition cases which followed it, but also raises doubts about the meaning of "designed" and similar terms as used in other contexts. For example, *United States v. Hamilton,* 626 F.2d 348 (4th Cir. 1980), concerned whether a broom handle may be a weapon or thing designed to kill or injure. The court rejected the dissenting judge's argument that "designed" refers to objective standards and instead relied on the intent with which the item is used, by the individual being charged.

Thus, both for its rejection of *Danovitz* and the questions it raises about the use of the term in other contexts, the lower court's construction of "designed for use" warrants a more complete examination by this Court.

Finally, the Sixth Circuit disregarded accepted rules of construction in interpreting the Ordinances, unnecessarily striking them down and creating a serious problem for any state or local government which legislates on a matter which may be tested in court.

This Court has consistently sought an interpretation which supports the constitutionality of legislation before it. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963); *Califano v. Yamaski*, 442 U.S. 682, 99 S. Ct. 2545, 2553 (1979); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). Only where there is no constitutional construction available can the legislation be found unlawful. *Screws v. United States*, 325 U.S. 91, 100 (1945).

In addition, this Court has recognized that there are limitations in the English language inherent in all legislation, which must be taken into account in testing the constitutionality of a law. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 578-9 (1973). Thus, a court presumes that the legislative body acted constitutionally, *United States v. Kiffer*, 477 F.2d 349, 352 (2d Cir. 1973); and, therefore, reasonable interpretations which support the constitutionality of an ordinance are to be indulged. *Tower Realty v. City of East Detroit*, 196 F.2d 710, 718 (6th Cir. 1952).

The Sixth Circuit disregarded these principles, drawing a distinction between interpreting federal and state legislation. "Our reasoning and decision in this case is shaped by our lack of power to put a limiting construction on the municipal ordinances." Slip Opinion, at 19. But that distinction is not supported by prior federal case law. As this Court plainly stated in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975):

> [W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction. . . .

In the absence of a binding state decision, this Court has refused to adopt an interpretation which would render a state law unconstitutional. *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 114-5 (1939). Rather this Court has espoused Justice Frankfurter's notion of extrapolating what a state law means in order to provide the widest latitude consistent with the United States Constitution. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), relying on *Garner v. Louisiana*, 368 U.S. 157, 174 (1961). And, we submit, such a rule becomes exceedingly important in a situation, such as the one before the Court, where the federal courts refuse to abstain and also stay enforcement of the law in question, thereby effectively eliminating any opportunity the state agency may have to obtain a narrowing construction from a state court. *Cf. Clifford Jacobs Motors, Inc. v. Chrysler Corp.*, 357 F. Supp. 564, 572, n.1 (S.D.Ohio 1973).

This matter of construing the Ordinances becomes paramount when we realize that each of the district courts which have considered the Model Act have had no difficulty in finding a construction which rendered it constitutional. For example, with respect to the first issue presented to this Court, the decision in *The Casbah, Inc. v. Thone*, No. 80-0271 (D.Neb. Sept. 26, 1980), states, at 8-9:

> Plaintiffs claim that the "designed for use" phrase in the definition of drug paraphernalia is vague. They

> cite an Indiana drug paraphernalia case where the judge was troubled by the term. *Indiana Normal v. Sendak*, No. TH 75-142-C p.13 (S.D.Ind. 1980). The Court finds that the term is not vague when it is read in the context of the entire statute. "Designed for use" in L.B.991 refers not to the physical characteristics of an object but to the subjective intent or plan of the person controlling the object. The whole tenor of the statute makes clear that any object, *depending upon its use*, can be drug paraphernalia. In fact, section two of the statute sets out fourteen factors which are to be considered in determining if any given object is paraphernalia; those factors focus not on the physical features of the suspected item but on the context in which the item is found. The factors are an aid in determining whether a person "designed" the object as paraphernalia. The physical properties of an item may not offer a clue about its illicit use. As the court in *Delaware Accessories Trade Assn. v. Gebelein*, No. 80-285 p.5 (D.Del. 1980) said "the statute itself indicates that 'designed for use' refers not to structure but to intent." In short, when "designed for use" is integrated into the statute it is not vague nor even easily susceptible to misunderstanding.

WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1969) simply defines "designed," at 493: "formed or done according to design; planned; purposed; intended." In other words, the Ordinances plainly were subject to a readily available narrowing construction; the Sixth Circuit refused to adopt it.

Similarly, in considering the list of objects which may be paraphernalia when the requisite intent is present, the lower court admits, Slip Op., at 29, that the listed items are

not "per se" paraphernalia. "Because the ordinances define drug paraphernalia in terms of its use, intended use or designed use, and because the phrase 'such as' introduces the lists, the statutory language indicates that the listed items are only examples of items which could be drug paraphernalia." The lower court expressed no concern over items listed such as scales, balloons, or envelopes, presumably because of the element of criminal intent. Yet, the court singled out "miniature cocaine spoons" and "roach clips" as being vague. Quite obviously, the same intent requirement that applies to every other listed item applies to these two as well. Again, as the *Casbah* court held, at 11:

> Plaintiffs complain that the statute impermissibly outlaws items and punishes their innocent users because of the criminal intent of others. * * * Only when an object is used, intended for use, or designed for use with a controlled substance does it become prohibited.

Since it is agreed that there are no objective design characteristics by which paraphernalia can be defined, the terms "chillums" or "bongs" which the Sixth Circuit approved, at 29, can be no more definite than the terms roach clips or miniature cocaine spoons. In both cases it is the intent which is the distinguishing feature.

Once again, in considering the listing of relevant factors contained in the definition, the lower court deemed some proper and singled out others as unlawful on the basis of hypothetical applications of the factors. But, we submit, such reasoning disregards the fundamental rule that Due Process requires only "fair warning." *Rose v. Locke*, 423 U.S. 48, 50 (1975). Marginal cases are not the proper test for determining a law's constitutionality. *United States v. Petrillo*, 332 U.S. 1, 7 (1947); *United*

States v. Parness, 503 F.2d 430, 442 (2d Cir. 1974). Doubt as to certain hypothetical cases which may never arise is not sufficient basis for declaring a law unconstitutional. *Robinson v. United States*, 324 U.S. 282, 286 (1945). *See also Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952); *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965).

Thus, once again, the lower court went needlessly far afield rather than making a close reading of the Ordinances and rendering a decision on that basis alone. As the court held in *Mid-Atlantic Accessories Trade Association v. Maryland*, No. H-80-1343 (D.Md. Nov. 11, 1980):

> The simple answer to these contentions is that none of these factors is dispositive. These listed criteria do not define drug paraphernalia but are merely to be considered by a court or other authority along with other relevant factors in determining whether an object is covered by the statutory definition. They are therefore only guides for determining whether the necessary criminal intent exists. To convict under the statute, a jury must still find beyond a reasonable doubt that a defendant had the requisite criminal intent. That these factors are relevant evidence does not negate the fact that the statute clearly requires proof of specific intent before a violation can be found. Slip Op., at 20.

Finally, in the case of the prohibition against advertising, the lower court again relied on hypothetical examples as the test of the Ordinances' constitutionality. The advisability of doing so is immediately called into question as a result of this Court's holdings that "overbreadth" analysis applies weakly, if at all, in the commercial speech context. *Friedman v. Rogers*, 440 U.S. 1, 99 S. Ct. 887, 894, n.9 (1979); *Ohralik v. Ohio State Bar Assn.*, 436 U.S.

447, 462, n.20 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). But, in any event, the lower court again refused to apply that limiting construction of the Ordinances which was readily available. In particular, the potential problems raised by this Court's decision in *Bigelow* are of small concern when one notes that the Model Act focuses on the act of placing an advertisement, giving the criminal act a specific situs, and further notes that all municipalities, including those in Ohio, have limited territory and limited legislative authority. *See, e.g.*, McQUILLIN, 5 MUNICIPAL CORPORATIONS (3d ed. rev.) § 15.30 at 108; *Cincinnati v. Rost*, 92 Ohio App. 8, 10-11 (1952). It is presumed that the governing body of the city was legislating with reference to the conduct of business within the territorial limits of the city. *City of Sedalia v. Shell Petroleum Corp.*, 81 F.2d 193, 196-7 (8th Cir. 1936).

In sum, we submit that the lower court was obliged to give the Ordinances that construction by which they could be rendered constitutional, as a result of repeated decisions by this Court. The authorities noted above, and others, make it plain that such a constitutional construction was readily available on the basis of the language used in the Ordinances. Yet, by failing to follow the dictates of this Court, enforcement of these laws was needlessly enjoined; and similar laws throughout the nation have been held in abeyance. Again, we submit that this is a substantial question which warrants this Court's full review.

CONCLUSION

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 8, 1980)

Nos. 80-3308, 80-3352, 80-3353

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECORD REVOLUTION NO. 6, INC.,
Plaintiff-Appellant,

v.

THE CITY OF PARMA, *et al.*,
Defendant-Appellee (80-3308),
ALEXANDER J. LUKA d/b/a DAYSTAR BOUTIQUE,
Plaintiff-Appellant,

v.

THE CITY OF LAKEWOOD, *et al.*,
Defendant-Appellee (80-3352),
THE RIGHT PLACE, INC.,
Plaintiff-Appellant,

v.

THE CITY OF NORTH OLMSTED, OHIO, *et al.*,
Defendant-Appellee. (80-3353).

APPEAL from the United States District Court for the Northern District of Ohio.

Before: EDWARDS, *Chief Circuit Judge,* and MARTIN and JONES, *Circuit Judges.*

JONES, *Circuit Judge.* Business owners in the cities of Parma, Lakewood, and North Olmsted, Ohio have chal-

lenged the constitutionality of ordinances prohibiting the use, sale and manufacture of "drug paraphernalia."[1] The district court, in a very thoughtful and well written opinion, sustained the constitutionality of the ordinances after severing certain phrases and construing the meaning or scope of other language. Being convinced that parts of the ordinances are vague and overbroad, in violation of the First Amendment right of free speech and the Fourteenth Amendment right of dues process, we reverse and enjoin enforcement of the ordinances.

I.

A. Rationale for Model Act

The "drug paraphernalia" ordinances in Parma, Lakewood, and North Olmsted are based almost verbatim on the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration of the United States Department of Justice. At the request of the Drug Policy Office of the President's Domestic Policy Council, DEA prepared the Model Act as an amendment to the Uniform Controlled Substances Act. In the Prefatory Note to the Model Act, DEA described graphically the severity of the national problem to which the Model Act responds:

> [T]he availability of Drug Paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of Drug Paraphernalia are reported as high as three billion dollars a year. What was a small phenomenon at the time the Uniform Act was drafted has now mushroomed into an industry so well-entrenched that it has its own trade magazines and associations.

App. 1230.

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1. The three cases have been consolidated on appeal.

The Justice Department determined that the law enforcement campaign against businesses selling drug paraphernalia should be fought mainly by state and local officials. Statement of Irvin B. Nathan, Deputy Assistant Attorney General, Criminal Division, before the H. R. Select Com. on Narcotics and Drug Abuse Control, November 1, 1979. App. 1216-17. The Model Act attempts to avoid or minimize the constitutional problems of previous statutes and municipal ordinances, yet to provide an effective law to curb the sale of drug paraphernalia. *Id.* at 1217-18.

Mr. Nathan strongly espoused the enactment of the Model Act by states and cities in his statement to the House Committee on Narcotics and Drug Abuse Control. He stated:

> The positive features of such a bill are apparent. Outlawing the open advertisement and sale of drug paraphernalia will send a clear message to impressionable adolescents and others that society does not condone the use of drugs. Governmental authority will present a more consistent and reasoned face to the community by refusing to let the paraphernalia industry mock the law by thriving off the wide spread [sic] use of illegal drugs. Communities will no longer be offended by the presence of open symbols of illegal activity in their midst.

App. 1221-22.

In closing, Mr. Nathan added several cautionary remarks on the potential problems of constitutionality and feasibility. First, he noted that "enforcement of such an act by state and local authorities may prove difficult and may divert scarce resources from more pressing drug concerns." App. 1223. Mr. Nathan further warned:

> Even if there were resources to permit vigorous enforcement, there is a significant potential for mistakes and abuse by local authorities. There may be additional invasions of privacy if law enforcement personnel need see only an implement such as a pipe, rather than any actual evidence of the drug itself, in order to make an arrest and conduct a search. Moreover, the prevalence of drug paraphernalia may leave law enforcement personnel in the difficult position of having to engage in selective enforcement, with the potential for disparate treatment of similarly situated individuals.

App. 1224. He was concerned about the possibility of "increased public corruption" resulting from enforcement of the Act. App. 1224. He also questioned the potential effectiveness of drug paraphernalia statutes. App. 1222-23. Finally, Mr. Nathan listed several options in lieu of the comprehensive prohibition against the use, sale or manufacture of drug paraphernalia, such as licensing, zoning, forbidding sales to minors, and regulating the form of advertising. App. 1225.

B. Structure of Model Act[2]

The Model Act contains two main sections. The first section sets forth at great length the definition of "drug paraphernalia." In the first subsection, drug paraphernalia is defined as anything which is "used, intended for use, or designed for use" in introducing controlled substances into the body. A number of specific examples are then given, each described by the phrase "used, intended for use, or designed for use." One example of drug paraphernalia is "testing equipment used, intended for use or designed for

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2. The entire ordinance as codified in Parma before its amendment is reprinted as an Addendum to our opinion.

use in identifying or in analyzing the strength, effectiveness or purity of controlled substances." The list of examples concludes with the catchall category of "objects used, intended for use, or designed for use in ingesting, inhaling or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body," followed by another list of thirteen items, such as water pipes, roach clips, chillums, and bongs.

The second subsection of the first main section of the Model Act delineates fourteen factors that a "court or other authority should consider, in addition to all other logically relevant factors," "in determining whether an object is 'drug paraphernalia.'" These factors include the statements by an owner about the item's use, prior convictions of the owner, national or local advertising, and the existence of lawful uses for the item.

In sum, the Model Act uses three techniques to define "drug paraphernalia." First, it uses the repeated phrase "used, intended for use, or designed for use." Second, it lists by way of example a number of objects that could be drug paraphernalia. Third, the Model Act sets forth numerous factors to be considered in determining whether or not an object is drug paraphernalia.

Following the extensive definition of "drug paraphernalia," the second main section of the Model Act defines the substantive criminal offenses. The use, or the possession with intent to use, of drug paraphernalia is prohibited. Also proscribed is the delivery or manufacture of "drug paraphernalia," when the deliverer or manufacturer knows or should reasonably know that the drug paraphernalia will be used with controlled substances. The Model Act makes criminal the placing of any advertising in the print media promoting the sale of objects designed or intended for use as drug paraphernalia, when the person

placing the advertising knows or should reasonably know the purpose of the advertisement. The Model Act provides for the civil forfeiture of all drug paraphernalia and a special offense for the delivery of drug paraphernalia to a minor. Finally, the Act states that its sections or subsections are severable; in the event that any part is declared unconstitutional the remaining parts can still be given effect.

II.

A. City of Parma Ordinance No. 242-79

The City of Parma, Ohio, has long expressed its desire to curb drug abuse in its community. In 1977, the Parma City Council enacted a resolution urging that the possession and private use of marihuana not be legalized. Depo. of Victor LaButta, App. 1088. In 1978, Doris Krawczyk, Councilwoman in Parma, received a copy of a petition addressed to the manager of Parmatown Shopping Mall from constituents who were angry at the sale of novelty items, called drug paraphernalia, by the plaintiff in this case, Record Revolution No. 6, Inc. Depo. of Doris Krawczyk, App. 924, 1043. Krawczyk requested the city law department in April, 1978, to draft legislation to ban the sale of drug paraphernalia, but the law department advised her that "no basis or foundation" for legislation then existed. Depo. of Doris Krawczyk, App. 924. Krawczyk's interest in drug paraphernalia legislation revived in October, 1979, when she read an article on an ordinance enacted in Lakewood, California that banned the sale of drug paraphernalia to minors. Depo. of Doris Krawczyk, App. 926-27. Then on November 14, 1979, an editorial in *The Cleveland Press* informed her of the Model Drug Paraphernalia Act. App. 1044. She obtained a copy of the Model Act and requested the city law department to draft similar legislation. App. 1045.

On January 7, 1980, the Parma City Council enacted Ordinance No. 242-79,[3] which is almost identical to the Model Act.[4] The ordinance was passed as an emergency measure and became effective immediately upon the mayor's signature on January 9, 1980. The Parma City Council did not commission a study of the drug abuse problem, but based its conclusions on the need for the legislation on the personal experience of its members, the statements of DEA Administrator Peter Bensinger and Deputy Assistant Attorney General Nathan, and the testimony before the Council of two Parma police officers. Testimony of Doris Krawczyk, App. 662; Depo. of Doris Krawczyk, App. 929-35, 941, 944; Depo. of Victor Labutta, App. 1098-99, 1101, 1116-19. Counsel for Record Revolution No. 6, Inc. testified against the enactment of the ordinance before the City Council.

On January 10, 1980, Record Revolution No. 6, Inc. filed an action in the federal district court alleging the unconstitutionality of the Parma Ordinance and seeking declaratory and injunctive relief. Record Revolution No. 6, Inc. is an Ohio corporation which sells retail records, magazines, jewelry, T-shirts, and "novelty items," such as various kinds of pipes. At a hearing on the temporary restraining order the next day, the City agreed not to enforce the ordinance until the district court reached a final decision on the merits. The district court held a consolidated hearing on the preliminary and permanent injunction on January 28 and 30, 1980. After allowing time for the submission of post-trial briefs, the district

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3. The ordinance is codified as §§ 620.01(dd) and 620.04 of the codified ordinances of Parma, Ohio.

4. The Parma ordinance added the term "sell" to § 620.04 (b); added all of § 620.04(e), which exempts certain medical and other individuals from the ordinance; and limited the severability clause in § 620.04(g) to § 620.04.

court issued its lengthy, comprehensive memorandum opinion on April 14, 1980.

The testimony at the injunction hearing can be summarized briefly. Francis Szabo, Chief of the Parma Police, testified that the police had notified the one retailer of suspected drug paraphernalia in Parma of the ordinance; the police had not been trained yet to enforce the ordinance; and no attempt at enforcement had been made. App. 642-45.

Doris Krawczyk, through her in-court testimony and her deposition, stated that the ordinance was based entirely on the language and research of the Model Act. App. 662, 940-41, 976, 994. She also testified that she could not identify items which violated the ordinance and that such a determination was the responsibility of the police. App. 673, 675, 682-83, 928-30, 933, 969, 984, 994, 997, 1003. In her opinion, the lawfulness or unlawfulness of an item turned on the purchaser's intent. App. 683-84, 691, 993, 995-96.

Clarence D. Bennett, Detective of the Parma Police with the duty of investigating organized crime and narcotics, testified that the ordinance would aid the fight against drug abuse, but that it still had not been enforced. App. 1173, 1175. He identified certain items as drug paraphernalia, such as all pipes with screens, all chamber pipes, small-bowled pipes, and very small pipes, and stated that the seller's intent could be inferred from the item itself. App. 712-13, 715, 717-18, 728, 731, 743, 1178, 1183, 1185-86. He would enforce the ordinance, when other common items were involved, only if residue of an illegal drug were discovered on the item. App. 722, 730, 1183, 1188-89, 1206-07. He also concluded that a policeman would not know how to enforce the ordinance with respect to circumstances in which the seller reasonably should have

known that the purchaser would use the item with illegal drugs. App. 742.

Herbert J. Bessai, a pipe maker and retail merchant for 31 years, and a collector and appraiser of pipes, testified as an expert witness for plaintiff. According to his testimony, the design of a pipe gives no indication of whether it will be used or legal for illegal purposes. For example, he stated that water pipes have long been used to give the dryest, coolest smoke and that screens serve to keep the tobacco away from the moisture in the bottom of the pipe. App. 750, 752-53, 757. He did say on cross-examination that he had never made a pipe out of plastic and that plastic pipes were normally sold in "head gear shops." App. 773-74. He also stated on redirect examination that he was certain some of the pipes which he has sold have been used to smoke marijuana. App. 777-78.

After Parma's motion for dismissal at the close of plaintiff's case was denied, Parma called two witnesses.[5] Charles J. Carter, Special Agent of the DEA in charge of the Cleveland office, testified that the drug paraphernalia ordinance would assist law enforcement efforts against drug abuse. App. 835-36.

Richard Rutt, a detective in the narcotics unit of the Cleveland Police Department, testified as an expert in narcotics law enforcement. In his opinion, the drug paraphernalia ordinance would reduce drug abuse somewhat. App. 847. He stated on cross-examination that the design of almost every item listed in § 620.01 (L), such as a water pipe or a screen in a pipe indicates an intent to design, sell or use the item with illegal drugs. App. 849-

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5. Bernard Survoy, Clerk of the Parma City Council, was also called as a witness. The attorneys then stipulated to his testimony on the authenticity of the Parma ordinance.

51, 857-59, 861-62, 869-71, 875, 878-81. However, he also testified that any pipe could be used to smoke marijuana, that he would not call Bessai's testimony incorrect, and that some sellers could believe in the lawfulness of an item on the basis of its patent. App. 852, 871.

B. City of Lakewood Ordinance No. 5-80[6]

The City of Lakewood enacted its drug paraphernalia ordinance, Ordinance No. 5-80 on January 21, 1980. The Lakewood ordinance, before its amendment on April 21, 1980, was identical to the Parma ordinance, except that it did not provide a special offense for sales to minors. The amending Ordinance, No. 29-80, added this special offense and repealed original § 513.01 (cc)(2)(K) in its entirety and the phrase "under circumstances where one reasonably should know" from § 513.04(b), (c).

The City of Lakewood participated as amicus curiae in the injunction hearing on the Parma ordinance. On May 6, 1980, after the district court issued its opinion sustaining the constitutionality of the Parma ordinance, Alexander Luka, doing business as Daystar Boutique in Lakewood, filed his complaint attacking the constitutionality of the Lakewood drug paraphernalia ordinance and requesting declaratory and injunctive relief. Daystar Boutique is a retail establishment similar to Record Revolution No. 6, Inc. No evidentiary hearing was held. The district court entered summary judgment on May 8, 1980 for defendants on the basis of its opinion in *Record Revolution No. 6, Inc. v. City of Parma.*

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6. The ordinance is codified as §§ 513.01(cc) and 513.04 of the General Offenses Code of the Codified Ordinances of the City of Lakewood.

C. City of North Olmstead Ordinance No. 80-28[7]

The City of North Olmsted enacted its drug paraphernalia ordinance, Ordinance No. 80-28, on May 6, 1980. Being an emergency measure, the ordinance became effective on May 7, when signed by the mayor. The North Olmsted ordinance is identical to the Parma drug paraphernalia ordinance as amended. On May 7, 1980, the Right Place, Inc., a retail establishment similar to Record Revolution No. 6, Inc., filed a complaint challenging the constitutionality of the North Olmsted drug paraphernalia ordinance and seeking declaratory and injunctive relief. No evidentiary hearing was held. The district court entered summary judgment for the defendants on the basis of its decision in *Record Revolution No. 6, Inc. v. City of Parma.*

D. District Court Opinion

The district court held that the Parma ordinance was not vague or overbroad as construed. The inclusion of "use, intended for use and designed for use" in the definition of "drug paraphernalia" in § 620.01(dd)(1) was held to save the ordinance from vagueness. The district court also construed § 620.01(dd)(1) to refer to the defendant's use, intent, or design. The district court declared that the ordinance does not make the items listed in § 620.01 (dd)(1)(A)-(L) drug paraphernalia *per se*, since the element of the defendant's use, intent, or design must be proven. Finally, with respect to § 620.01, the district court ruled that subsection (K) was vague, because it created a danger of discriminatory and arbitrary enforcement. Therefore, the district court severed subsection (K) from § 620.01, pursuant to the severability clause in § 620.04(g).

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7. The ordinance is codified at §§ 513.01(bb) and 513.04 of the Codified Ordinances of the City of North Olmstead.

The district court found § 620.04 not vague or overbroad, except for the phrase "reasonably should know" in § 620.04(b) and (c). The district court severed this phrase from those subsections. The district court held that the transferor's knowledge of the transferee's intended use of an item sufficiently protects the innocent and preserves the section from vagueness and overbreadth. In doing so, it rejected plaintiff's contention that due process required proof of specific intent. The district court construed § 620.04(c) to apply only to advertisements placed in Parma about "drug paraphernalia" available in Parma. As such, this subsection was held not to infringe upon speech protected by the First Amendment. The district court did not find any constitutional problem with § 620.04(d), (e), (f) and (h).[7a]

E. Issues on Appeal

Plaintiffs raise four main arguments on appeal. First, they contend that the district court lacked the power to add to, sever, and construe the statutory language of the municipal ordinances. Second, the definition of "drug paraphernalia" is vague and overbroad, they argue, because the proscribed items are not adequately described and the definition relies on transferred intent. Plaintiffs' third contention is that the offenses are vague and overbroad because proof of specific intent is not necessary, knowledge can be inferred from facts which do not support the inference, and the proscription on advertising includes protected speech. Finally, they argue that the list of items

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7a. On May 5, 1980, the City Council of Parma amended its drug paraphernalia ordinance to agree in part with the district court's opinion. App. 1258-59. The amending ordinance, No. 103-80, repealed the original § 620.01(dd)(2)(k) and the phrase "under circumstances where one reasonably should know" from § 620.04(b) only.

in § 620.01(dd)(1)(A)-(L) creates mandatory or rebuttable presumptions, which do not rest on supportable inferences.

The plaintiffs have not appealed the district court's other conclusions of law, which held that the ordinances did not violate the equal protection clause, the commerce clause, the Fourth Amendment, the impairment of contracts clause, the bill of attainder clause, or the supremacy clause through federal pre-emption.

Parma contests two adverse rulings by the district court.[8] The district court held that it had subject matter jurisdiction, in that an actual case or controversy was present. Parma has filed a motion to dismiss this appeal for lack of an actual case or controversy. The district court also denied Parma's motion to abstain in order to allow the state courts an initial opportunity to construe the ordinance.

III.

A. Case or Controversy

(1) Threat of Prosecution

The City of Parma argues that this Court and the district court lack subject matter jurisdiction because plaintff has not been threatened with prosecution under the drug paraphernalia ordinance.[9] Parma relies on the testimony of Police Chief Szabo and Councilwoman Krawczyk. According to their testimony, the ordinance has still not been enforced because Parma agreed to withhold enforcement

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8. Though defendants-appellees did not file a cross-appeal, they are permitted to advocate any ground in the record that will require affirmance of the district court's judgment.

9. Lakewood and North Olmstead have not challenged the subject matter jurisdiction of this Court or the district court.

pending the district court's hearing of the case. After that this Court granted an injunction pending appeal. They also testified that the ordinance would not be enforced until the police had been trained in its provisions and business owners had been given public notice.

Record Revolution No. 6, Inc. seeks a declaratory judgment and injunctive relief. Though the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, cannot remove the jurisdictional requirement of Article III, § 1 of the Constitution, a genuine threat of criminal prosecution under legislation that allegedly is constitutionally defective does present an actual case or controversy. *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974). The Declaratory Judgment Act represents Congress' judgment that, in these circumstances, it is unfair and may deter the exercise of constitutionally protected rights to compel a person to wait for an actual arrest or prosecution before allowing that person to test the legislation in court.

The facts in this case demonstrate that the threat of prosecution of Record Revolution No. 6, Inc. under the Parma drug paraphernalia ordinance is not "imaginary," "speculative," or "chimerical," and that the threat continues to exist at this stage of the proceedings. *Id.* at 459. Councilwoman Krawczyk's first reported desire to enact drug paraphernalia legislation arose from the receipt of a petition from her constituents protesting the sale of "drug paraphernalia" by Record Revolution No. 6, Inc. Depo. of Doris Krawczyk, App. 924, 1043. Krawczyk visited Record Revolution No. 6, Inc. and concluded that the store was selling drug paraphernalia. Depo. of Doris Krawczyk, App. 924, 928-34. The ordinance explicitly decries the business activity of head shops. Though Krawczyk testified that the ordinance was not aimed at any particular store, she knew only one store, Record

Revolution No. 6, Inc., that would be subject to the ordinance. Depo. of Doris Krawzcyk, App. 935. The deposition testimony of Councilman Labutta and Detective Bennett confirms that Record Revolution No. 6, Inc., would be a primary target for enforcement of the ordinance. App. 1103-04, 1106-07, 1111-12, 1114, 1180-81, 1201. Police Chief Szabo stated that there is only one retailer in Parma subject to the ordinance and that this retailer had received notice of the ordinance. App. 644. According to Chief Szabo, he had not told Record Revolution No. 6, Inc., that the police had no intention of enforcing the ordinance. App. 644. In fact, every testifying police officer identified as drug paraphernalia items sold by Record Revolution No. 6, Inc. The only reason for the lack of enforcement to date is the injunction pending appeal. Depo. of Doris Krawczyk, App. 1018; Depo. of Clarence D. Bennett, App. 1175. Under these circumstances, Record Revolution No. 6, Inc. has plainly demonstrated a sufficient threat of prosecution to establish the presence of an actual case or controversy. *See High Ol' Times, Inc. v. Busbee*, 621 F.2d 135, 139 (5th Cir. 1980); *Tobacco Road v. City of Novi*, No. 79-71000 (E. D. Mich., June 21, 1979); *Riddle v. Clack*, No. CA-3-77-0525-D (N.D. Tex, August 25, 1977).

(2) Mootness

Defendants' amendments of their ordinances to comply with the district court's opinion raises the question of mootness. We note, first, that the defendants have not completely harmonized their ordinances with the district court's opinion. The ordinances proscribe the placement of advertising in any printed material of prohibited items available anywhere. In contrast, the district court construed the ordinances to apply only to advertisements placed in printed material in the three cities about prohibited items available in the three cities. Also, North

Olmsted and Parma, unlike Lakewood, deleted the phrase "or under circumstances where one reasonably should know" from § 620.44(b) only. The district court severed this phrase from § 620.04(c) as well.

Plaintiffs challenge the constitutionality of the ordinances as originally enacted and as amended. The continuing vitality of these ordinances prevents this case from being moot and distinguishes *Indiana Chapter, NORML, Inc. v. Sendak,* No. 80-1305 (7th Cir., July 22, 1980) (State of Indiana repealed statute in entirety while appeal pending).

Therefore, we hold that plaintiffs have demonstrated an actual case or controversy. Consequently, appellees' motion to dismiss this appeal for lack of subject matter jurisdiction is denied.

B. Abstention

A substantial hurdle to the exercise of our jurisdiction is the branch of abstention doctrine elaborated in *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1941).[10] The *Pullman* doctrine counsels abstention in "narrowly limited special circumstances," "where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 306 (1979), *quoting Kusper v. Pontikes,* 414 U.S. 51, 54 (1973). To justify abstention, the questions of state law must be uncertain and amenable to a construction by the state

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10. Since no state criminal prosecution is pending against plaintiffs, we do not face a question of abstention under *Younger v. Harris,* 401 U.S. 37 (1971) and its progeny.

A separate question, which we shall address later, is the propriety of granting injunctive relief as opposed to simply awarding a declaratory judgment.

courts that would resolve or substantially alter the federal constitutional issues. *High Ol' Times, Inc. v. Busbee,* 621 F.2d 135, 139 (5th Cir. 1980); *D'Iorio v. County of Delaware,* 592 F.2d 681, 686 (3rd Cir. 1978). Another factor is whether the federal court's decision would unduly interfere with important state policies or regulatory programs. 621 F.2d at 139; 592 F.2d at 686.

As a general rule, abstention is not appropriate in cases challenging the constitutionality of a statute on grounds of vagueness and overbreadth, for the reasons that such statutes often are not subject to a saving construction, which would eliminate or narrow the federal constitutional issues, and that delayed resolution of state law questions implicating important federal constitutional rights should be avoided. *Harman v. Forssenius,* 380 U.S. 528, 537 (1965); 621 F.2d at 140 n. 6; 592 F.2d at 692 n. 19. Also, the federal court should not abstain if lengthy, piecemeal litigation in the state courts would be necessary to define or resolve the issues of state law. *Baggett v. Bullitt,* 377 U.S. 360, 378 (1964). These principles of abstention should be applied to effectuate the more general concerns of avoiding needless constitutional litigation and needless friction with state adjudication and policy-making. *Moore v. Sims,* 442 U.S. 415, 427-30 (1979); *Kusper v. Pontikes,* 414 U.S. at 54.

The district court did not state its reasons for denying the motion to abstain, but it did reach the correct result. The state court could not construe the ordinances to eliminate the problems of vagueness and overbreadth. The constitutional defect, which we will discuss later, in the definition "drug paraphernalia" necessarily infects the entire ordinance. Furthermore, the overbreadth of the proscription on advertising deters business owners from engaging in constitutionally protected conduct. Though

the Ohio courts are very capable of applying federal constitutional principles, and can hear declaratory judgment actions, Ohio Rev. Code § 2721.03, their powers of construction are not limitless. *State v. Young,* 62 Ohio St. 2d 370, 374, 406 N.E.2d 499, 502 (1980). The Ohio courts, like federal courts, cannot rewrite the language of a statute. *Id.* Only such judicial rewriting of the drug paraphernalia ordinances could save their constitutionality. This factor strongly undercuts the argument for abstention. *Amusement Devices Ass'n v. Ohio,* 443 F. Supp. 1040, 1048-49 (S.D. Ohio 1977) (3-judge district court).

Abstention is also inappropriate in these cases because the ordinances are challenged on their face and the questions raised are predominantly questions of federal constitutional law. *Steffel v. Thompson,* 415 U.S. at 474-75. The questions of state law have a very minimal impact on the issues before us. Finally, we must review the constitutionality of only one ordinance in each of three cities. Our decision will not disrupt a comprehensive state regulatory program or ongoing procedures in state agencies or state courts. *Compare Moore v. Sims,* 442 U.S. 415 (1979); *Railroad Commission of Texas v. Pullman, Inc.,* 312 U.S. 496 (1941); *Parker v. Turner,* No. 78-1063 (6th Cir., July 3, 1980).

Therefore, we hold that the *Pullman* doctrine does not require abstention from deciding the constitutionality of the drug paraphernalia ordinances.[11]

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11. *Accord, High Ol' Times, Inc. v. Busbee,* 621 F.2d 135, 139 (5th Cir. 1980); *Indiana Chapter, NORML, Inc. v. Sendak,* No. TH 75-142-C (S.D. Ind., February 4, 1980) (3-judge district court), *vacated as moot as the time of appeal,* No. 80-1305 (7th Cir., July 22, 1980); *Record Museum v. Lawrence Township,* 481 F. Supp. 768 (D.N.J. 1979).

IV.

A. Lack of Power to Construe Ordinances

Before discussing the merits of the vagueness and overbreadth issues, we must first consider the extent of our power to give a saving construction to the drug paraphernalia ordinances. The district court construed the drug paraphernalia ordinances by adding to, deleting from and defining the statutory language. A federal court, however, has very limited powers in construing state statutes or municipal ordinances. For the federal court's interpretation of state or municipal legislation is "not binding on the state courts and may be discredited at any time—thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless." *Moore v. Sims,* 442 U.S. at 428. *See State v. Young,* 62 Ohio St.2d at 375 n.2, 406 N.E.2d at 503 (After citing to a federal court decision on the same state statute, the Ohio Supreme Court declared: This federal case is not binding upon this court, and we note the decision rendered in that case only as supporting authority). Consequently, a federal court must take the state statute or municipal ordinance as written and cannot find the statute or ordinance constitutional on the basis of a limiting construction supplied by it rather than a state court. *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971). As stated in *Hynes v. Mayor and Council of the Borough of Oradell,* 425 U.S. 610, 622 (1976), "[e]ven assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out . . . we are without power to remedy the defects by giving the ordinance constitutionally precise content." *See also Smith v. Goguen,* 415 U.S. 566, 575 (1974); *Gooding v.*

Wilson, 405 U.S. 518, 520 (1972).[12] The proper course for a federal court to follow, if a limiting construction will save the constitutionality of a state statute or municipal ordinance and the statute or ordinance is fairly susceptible to such a construction, is to abstain pursuant to the *Pullman* doctrine.

The power of a federal court to sever sections or phrases from state legislation poses a slightly different problem of interpreting state law. In anticipation of litigation on the constitutionality of legislation, a state legislature or city council may provide expressly in the legislation for severability in the event that only parts of the legislation are declared unconstitutional. The task of the federal court, absent a controlling state decision, is to ascertain whether the unconstitutional parts of the legislation are so interwoven with the remainder of the statute that the remainder cannot stand alone. This is a question of the legislative intent and the interpretation of the legal effect of the remainder of the legislation standing by itself. *Champlin Refining Co. v. Corporation Comm'n of Oklahoma,* 286 U.S. 210, 234-35 (1932); *Dorchy v. Kansas,* 264 U.S. 286, 290-91 (1924). *See Emmons v. Keller,* 21 Ohio St.2d 48, 254 N.E.2d 687 (1970). Abstention on the question of severability should be considered. *Dorchy v. Kansas,* 264 U.S. at 291.

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12. In *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) the Court stated that a federal court could "extrapolate" the "allowable meaning" of a municipal ordinance. The Court found that the state court would construe the ordinance narrowly and concluded that the statutory prohibitions were clear, though the language permitted some flexibility. In effect, the Court declared that the language of the ordinance, as it read the ordinance and the state court would read the ordinance, was not vague. The Court did not add, delete or narrow statutory terms. The fine line between "extrapolation" and "construction" was recognized: " 'Extrapolation,' of course, is a delicate task, for it is not within our power to construe and narrow state laws." *Id.* at 110.

From these principles, it will become clear from our discussion of the issues that the district court, in its sincere desire to uphold the constitutionality of these municipal ordinances, exceeded the scope of its powers. The district court should have declared the ordinances unconstitutionally vague and overbroad on the basis of the defects that it found in the ordinances. Our reasoning and decision in this case is shaped by our lack of power to put a limiting construction on the municipal ordinances.

B. Standards of Vagueness and Overbreadth

The due process clause of the Fourteenth Amendment includes the doctrines of void-for-vagueness and overbreadth. These two doctrines have distinct meanings and purposes, though a statute which is vague is also often overbroad. The void-for-vagueness doctrine commands any statute to give persons of common intelligence fair notice of the persons covered and the conduct proscribed. *Colautti v. Franklin,* 439 U.S. 379, 390-91 (1979). Fundamental fairness, as well as a proper regard for preventing the deterrence of constitutionally protected conduct, requires that persons not be compelled to guess at their own peril the meaning and application of a statute. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). Ascertainable standards of guilt are imperative in order to protect against arbitrary, erratic, and discriminatory arrests, prosecutions and convictions. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972); *Winters v. New York,* 333 U.S. 507, 515 (1948). Unless the statute itself prescribes sufficiently precise standards, basic policy decisions are impermissibly delegated to the personal predilections of the police, prosecutors and juries. *Smith v. Goguen,* 415 U.S. at 575 (1974); *Grayned v. City of Rockford,* 408 U.S. at 108. "Legislators may not so abdi-

cate their responsibilities for setting the standards of the criminal law." 415 U.S. at 575. Finally, a greater degree of precision is required when the statute defines criminal offenses or impinges on activities protected by the First Amendment. *Hynes v. Mayor and Council of Borough of Oradell,* 425 U.S. at 620; *Winters v. New York,* 333 U.S. at 515; *Diebold, Inc. v. Marshall,* 585 F.2d 1327, 1336 (6th Cir. 1978). *But see Rose v. Locke,* 423 U.S. 48, 50 (1975) (per curiam).

The overbreadth doctrine prohibits a statute from making innocent or constitutionally protected conduct criminal. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971). The statutory language may be very clear, yet "sweep unnecessarily broadly to invade the area of protected freedoms." *Sawyer v. Sandstrom,* 615 F.2d 311 (5th Cir. 1980). The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.

C. Application to Drug Paraphernalia Ordinances

(1) Definition of Drug Paraphernalia

If the definition of "drug paraphernalia" is vague or overbroad in any respect, the ordinances must be declared unconstitutional. A precise and unambiguous definition of "drug paraphernalia" is critical because the ordinances seek to ban in certain circumstances only the sale of everyday items that have a myriad of innocent, lawful, and beneficial uses.[13] To pass constitutional muster, the ordinances must specify clearly the very limited circumstances in which the manufacture, sale or use of these common items is unlawful.

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13. The definition of "drug paraphernalia" includes "all equipment, products and materials of any kind."

The key phrase used by the ordinances to separate lawful from unlawful items is "used, intended for use, or designed for use." The definition of "drug paraphernalia" turns on the state of mind of a person or his act act with respect to an object. Plaintiffs contend first that the ordinances violate due process by allowing a defendant to be arrested, prosecuted and convicted on the basis of an act or state of mind of another person. For example, if the purchaser uses a pipe to smoke marijuana, do the ordinances permit the seller of the pipe to be arrested, prosecuted, or convicted on the basis of the purchaser's use? If the manufacturer intended that a chamber pipe be used for ingesting hashish, and the purchaser so uses the chamber pipe, do the ordinances permit the seller, who lacks such intent and did not use the chamber pipe himself to ingest hashish, to be arrested, prosecuted, or convicted on the basis of the manufacturer's intent and the purchaser's use?

These hypothetical questions explain the problem of transferred intent. The presence of transferred intent in the ordinances would infringe the due process clause by failing to give the defendant proper notice of the items defined to be drug paraphernalia and by convicting the defendant for another person's intent or misdeeds. The answer to the questions requires an understanding of the persons to whom the statute is directed. The description of the substantive offenses informs us that four categories of persons fall within the scope of the ordinances: manufacturers, wholesalers, retailers, and purchasers. Rather than specifically defining drug paraphernalia in terms of the state of mind or conduct of each category of person, the ordinances merely state the proscribed conduct or state of mind leaving the responsibility to the courts to apply the definitions to each category.

The reasoning of the district court demonstrates that the ordinances permit a person to be arrested, prosecuted or convicted only for that person's own use, intent, or design.[14] Due process requires this interpretation of the ordinances. *Hammerle v. United States,* 6 F.2d 144

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14. App. 1511, 512-13. The district court opined:

> As a general rule, a crime consists of two elements: (1) an act or omission, and (2) a state of mind - mens rea. Although the mens rea of an offense may differ from crime to crime, the general state of mind required is an intent to perform the criminal act. Of course, the mens rea and the act must occur simultaneously and the intent must be that of the criminal defendant. Because the definition of drug paraphernalia is referenced in each of the criminal offenses described in this Ordinance, it is an element of each of these offenses. Specifically, the criminal intent used to define drug paraphernalia is an element of the mental state required to convict under this Ordinance. Therefore, the pertinent intent must be that of the individual charged with having committed one of the offenses described in section 620.04(a)-(d). The court concludes that "black-letter" criminal law and the intent of the MDPA draftsmen compel the conclusion that the definition of drug paraphernalia must be interpreted in terms of the criminal defendant's intent and that this construction is reasonable and sensible.
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> * * *
>
> Defining all drug paraphernalia in terms of the state of mind of the seller of the item, does not solve the problem of transferred criminal intent. For example, if a manufacturer is prosecuted under section 620.04(b) and the term "drug paraphernalia" is defined in terms of the seller's intent, as Perma suggests, the manufacturer of an innocent item would be subject to criminal punishment because the seller intends it to be used with illegal drugs. The Ordinance regulates the following categories of conduct: use of paraphernalia with illegal drugs, possession of paraphernalia with intent to so use, placement of certain drug paraphernalia advertisements, and manufacture of paraphernalia for sole use with drugs.
>
> Therefore, defining all drug paraphernalia in terms of the intent of an individual classifiable in any one of these categories would cause a transferred intent problem whenever the definition was applied to the allegedly criminal conduct of individuals in one of the other categories. For this reason the court's construction, defining drug paraphernalia in terms of the intent of the individual charged with violating the Ordinance, is more reasonable and sensible.

App. 511-13 (Footnote deleted).

(6th Cir. 1925) (per curiam). Its conclusion is bolstered by the comments to the Model Act, which refer consistently to the potential defendant as the "person in control" of the item. App. 1236-37.[15] Lest we be accused of exceeding the scope of our authority to construe the ordinances to save their constitutionality, it must be noted that Ohio law would allow no other interpretation of the ordinances. *State v. Young,* 62 Ohio St.2d at 376-77, 406 N.E.2d at 505-506; *Chicone v. Liquor Control Comm'n of Ohio,* 20 Ohio App. 2d 43, 251 N.E.2d 864 (Ct. App. 1969). Therefore, we can extrapolate the meaning of the ordinances on the question of whose use, intent, or design must be present to allow the arrest, prosecution or conviction of a person.

The statutory terms "use" or "intended for use" are not vague or overbroad. Their meaning, as commonly understood words of the English language, is clear. Amicus suggests that "use" is vague, because the ordinance does not delineate whether it proscribes the sale of the same item used by the seller with controlled substances or the same type of item. Also amicus contends that the ordinance is vague, because it does not state when, how long ago, or how often the item must have been used unlawfully.[16] Amicus Br. of Glassman & Browning,

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15. The district court correctly rejected the testimony of Councilwoman Krawczyk and others on this point by ruling that the ordinance speaks for itself. App. 511-12, 671.

16. Amicus argues that this vagueness leads to absurd results, by proposing the following hypothetical:

> Two defendants sell antique ashtrays to customers who they know will use the ashtrays in conjunction with marijuana. Neither defendant intends that the antique ashtray be used in connection with illegal drugs, and neither has designed the ashtray for use with illegal drugs, but one of them, a former marijuana smoker, has actually used the ashtray himself, several years prior to the sale at issue, for holding the butts of marijuana cigarettes. If both are prose-

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Inc., 4, 13, 21. These arguments raise very marginal problems in the application of the ordinances that do not suggest the vagueness or overbreadth of the ordinances in their definition of the normal, general class of offenses. *United States Civil Service Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 578-79 (1973); *United States v. Petrillo,* 332 U.S. 1, 6-7 (1947). In most cases, an item will be defined as drug paraphernalia on the basis of its use when the substantive offense on which the defendant was arrested and indicted is use of drug paraphernalia. Amicus' hypotheticals, which focus on use by the retailer and then delivery to a buyer seem improbable and far-fetched. Even if such a sale would occur, the ordinances make clear the criminal offense of using an item with controlled substances and then transferring the item, knowing that the transferee will use the item with controlled substances. The resolution of amicus' marginal hypothetical situations must wait until an actual case arises.[17]

Therefore, we conclude that "used" and "intended for use" are not vague or overbroad in defining drug paraphernalia.[18]

Footnote continued—

> cuted for a violation of § 620.04(b), one will presumably be found innocent (for element no. 2 will not have been satisfied) while the other, the marijuana user, will presumably be guilty. This result would follow even though both had precisely the same intent and knowledge.

Amicus Br. of Glassman & Browning, Inc., 13.

17. We need not address on this appeal the potential problems of double jeopardy and of inconsistency with the Ohio statute on possession of marijuana that may arise upon a criminal conviction under these ordinances.

18. The ordinances of Parma, Lakewood and North Olmsted avoid the problems of vagueness created by defining drug paraphernalia in terms of customary or ordinary use. This latter definition imposes an impossible duty on a person to ferret out the use of an item that may normally be used in underground,

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The phrase "designed for use" is vague and overbroad.[19] The district court in *Indiana Chapter, NORML,*

Footnote continued—

illegal activity. *Record Museum v. Lawrence Township,* 481 F. Supp. 768 (D. N.J., 1979); *Riddle v. Clack,* No. CA-3-77-0525-D (N.D. Tex., August 25, 1977). This flawed definition also imposes liability on a defendant for the use of an item by another, without the defendant knowing, intending, or participating in that use. *Id.; Bambu Sales, Inc. v. Gibson,* 474 F. Supp. 1297, 1305 (D. N.J. 1979).

19. The district court concluded otherwise:

> Although many if not all of the items described in the Ordinance, as well as those introduced as evidence, have numerous legitimate uses, it is possible that an item which has an innocent use may be proved to have been designed for use with illegal drugs. As District Judge Boyle noted in her analysis of the evidence presented in *Tobacco Road v. City of Novi,* ..... F. Supp. ..... (E.D. Mich.; Slip Op. C79-71000, 6/21/79):
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> > Defendant also presented two tobacconists who testified that "paraphernalia" was the trade name for accessories intended to be sold for use with controlled substances. Reviewing the Nalpac catalogues, with which each witness was familiar, both identified many pipes which they described as unsuitable for tobacco use and designed for use with controlled substances. These opinions were based on the size of the bowl, the material of the pipe; and the absence of a stem, among other factors. Each witness testified that small-bowl pipes produce a short smoking period while tobacco smokers customarily seek long-smoking pipes and that non-porous materials, such as metal, glass, and acrylic, were unsuitable for tobacco smoking since they condensed rather than absorbed the mositure generated by lengthy pipe smoking. Each witnesses [sic] further testified that certain items in the catalogue such as razor blades and a "coke" mirror had absolutely no use in the tobacco industry.
> >
> > Defendant's evidence, on the other hand, established that there are items clearly identifiable as being primarily adapted or designed for the use of controlled substances. Indeed, it is inferable that such items are clearly identified both by manufacturers and by retailers for the commercial purpose of marketing the items to be used with controlled substances.
>
> This court does not share the concern that the Indiana District Court expressed in *NORML v. Sendak, supra* at 12, that the phrase "designed for use" is not of sufficient clarity to meet the mandate of due process. An item is designed for

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Inc. v. Sendak, supra, described well the unconstitutional ambiguity of this phrase:

> The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with I.C. 35-48-4-8 what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

App. 287. The comments to the Model Act indicate that the ordinances would apply to items which are not solely designed to be drug paraphernalia. App. 1237. Vagueness enters in our case once the ordinances begin to define drug paraphernalia in terms of the primary adaption or dominant purpose of the design. Then the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users. *Geiger*

Footnote continued—

> use with illegal drugs within the meaning of this Ordinance if the defendant intentionally—that is voluntarily and not because of mistake or other innocent reasons—designed or adapted it for use with drugs, regardless of any innocent alternative uses.

App. 533.

However, the fact that some items may have a design solely adapted for use with illegal drugs does not save the ordinances as drafted from vagueness and overbreadth.

v. City of Eagan, 618 F.2d 26 (8th Cir. 1980); *Music Stop, Inc. v. City of Ferndale,* 488 F. Supp. 390 (E.D. Mich., 1980).

The major ambiguity in defining drug paraphernalia in terms of the "design" of items is the lack of any design characteristics that distinguish lawful purposes from unlawful purposes. The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user. *Geiger v. City of Eagan,* 618 F.2d at 29. The record in our cases established the absence of any unique design characteristics.[20] Plaintiffs' expert, Herbert J. Bessai, testified that the size of a pipe, the presence of a screen or chamber in a pipe, the material from which the pipe is made, or the use of ice, water or air in a pipe does not indicate a design for unlawful use. He discussed in some detail the lawful uses of all of these design characteristics.[21] According to Bessai, the various designed pipes have been used lawfully for centuries. *Rose v. Locke,* 423 U.S. at 50. Bessai's testimony, as the sole expert at trial on the making and smoking of pipes, stands unrefuted. When asked directly if Bessai's testimony was incorrect, Detective Rutt of the Cleveland Police Department's Narcotics Unit testified that he could not say Bessai was wrong. App. 852. Consequently, we conclude that defining drug paraphernalia in terms of "design" is vague and overbroad.

The testimony of Detectives Bennett and Rutt, qualified experts on narcotics law enforcement, shows con-

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20. The district court erred in disregarding the evidence in the record in these cases, and in relying on evidence presented in another case that was not before it. App. 533 (footnote 5 of district court opinion.

21. The District court credited Bessai's testimony, but did not use the testimony to find the definition of drug paraphernalia vague or overbroad. App. 534 (footnote 6 of the district court's opinion).

vincingly the danger of arbitrary and discriminatory enforcement of the ordinances by the police. Detectives Bennett and Rutt would arrest any retailer who sold pipes with screens or chamber pipes, despite the ability to use these pipes lawfully. App. 712-13, 717-18, 850-51. Detective Rutt would arrest a retailer operating a "head shop" if it sold alligator clips or cigarette papers, but not a drug store owner selling the same items.[22] App. 853, 864-65. This testimony suggests that the ordinances would be enforced only against "head shops," as designated by the local law enforcement officials. No guidelines have been written to prevent such selective discriminatory enforcement. Because the ordinances would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad.[23]

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22. Note the bootstrapping nature of this definition of drug paraphernalia, because Detective Rutt defined a head shop as a store selling drug paraphernalia. App. 844.

23. In *World Imports, Inc. v. Woodbridge Township*, Civil No. 80-1414 (D.N.J. June 8, 1980), the district court declared:

> A number of retail stores commonly called headshops [sic] specialize in selling drug paraphernalia. Only the naive or duplicitous would contend that sales of drug paraphernalia by headshops were intended primarily for such innocent purposes as making a lamp from a water pipe, fashioning an article of personal adornment from a cokespoon or feeding wounded birds with syringes and eyedroppers. The purpose of a headshop is to capitalize upon, to perpetuate and augment the current interest, particularly among the young, in items which are obviously intended for the use with illegal drugs.

Tr: 9-10 (oral opinion upholding constitutionality of drug paraphernalia ordinance based on Model Act). This sentiment is the driving motivation and the practical theory behind the drug paraphernalia ordinances. Though based on fact, such an opinion does not resolve the problem of vagueness in defining drug paraphernalia, especially where the record evidence established the absence of design characteristics peculiar to use with controlled substances.

The vagueness and overbreadth in the definition of drug paraphernalia may reflect the failure of the legislators in Parma, Lakewood, and North Olmsted to investigate or study the drug paraphernalia industry. Parma Mayor Petruska, Councilwoman Krawczyk and Councilman Labutta each testified at deposition to their total lack of familiarity with drug paraphernalia and their inability to define it. App. 928-29, 933, 969, 984, 1130, 1140. Time and time again, they stated that the definition of drug paraphernalia was the responsibility of the police. App. 901-02, 930, 985, 1001, 1003. The record shows beyond peradventure the legislators' conscious delegation of basic policymaking decisions to the police, prosecutors, and juries. Due process forbids such delegation of legislative responsibility. *Smith v. Goguen,* 415 U.S. at 575; *Grayned v. City of Rockford,* 408 U.S. at 108.

Because the definition of drug paraphernalia is vague and overbroad, the ordinances must be declared unconstitutional. The explicit terms of the ordinances, unlike the Model Act, limit severability to the section describing the substantive offenses. Therefore, the defective parts of the definition cannot be severed. Moreover, the vagueness and overbreadth of the definition infect the whole ordinance.

Other parts of the ordinances have also been spiritedly contested. Plaintiffs argue that the ordinances create an irrebutable or rebuttable presumption that any item listed in subsection (L) of the definitional section is drug paraphernalia. They contend that the presumption, whether irrebutable or rebuttable, is not supported by inferences based on fact. *County Court of Ulster County v. Allen,* 442 U.S. 140 (1979).

We agree with the district court that the listed items are not presumed to be drug paraphernalia. *World Im-*

ports, Inc. v. Woodbridge Township, Civil No. 80-1414 (D. N.J. June 8, 1980) at 13. Because the ordinances define drug paraphernalia in terms of its use, intended use or designed use, and because the phrase "such as" introduces the lists, the statutory language indicates that the listed items are only examples of items which could be drug paraphernalia. The comments to the Model Act also explain the list of items as "a detailed description of common forms of property that *can fall* within the definition of drug paraphernalia *if* used, intended for use, or designed for use to violate the drug laws." App. 1238 (emphasis added). The statements of Deputy Assistant Attorney General Nathan and DEA Administrator Bensinger would tend to confirm, when read as a whole, that the list of items is intended to serve as examples to help clarify the definition of drug paraphernalia. App. 1064, 1217, 1219. Furthermore, since the listed items have many lawful uses, it is evident that the list could serve only as an example of possible forms of drug paraphernalia. Interpreting the listed items as drug paraphernalia *per se* would clearly make the ordinances vague and overbroad.

The items listed in subsection (L) as common forms of drug paraphernalia are described clearly for the most part. Certain items, such as chillums, bongs, and carburetion tubes and devices, are probably not familiar to the ordinary businessman or consumer. *See* Depo. of Victor Labutta, App. 1140. The comments to the Model Act suggests the common usage and understanding of this terminology among drug users and drug merchants. App. 1238. Of course, the prosecutor would have to prove the existence of such trade argot and the defendant's understanding of it. Otherwise, the danger exists that a law-abiding businessman could be arrested, prosecuted, and convicted on the basis of definitions known only to drug merchants and users.

The purpose of listing the common forms of drug paraphernalia is to lend precision to the definition in order to give more specific notice to persons potentially subject to the ordinances. The descriptions of "roach clips" and "miniature cocaine spoons" do not fulfill this purpose. A roach clip is defined as any object that can be used to hold the short end of a burning marijuana cigarette. Only the imagination of the user limits the number of things fitting this definition. All of these things, such as alligator clips, tweezers, and paper clips, have predominantly lawful, beneficial uses. Thus, the description of roach clips does not identify the objects potentially covered by the ordinances. Moreover, prohibiting the use or sale of roach clips leads to absurd results. A smoker of a marijuana cigarette is potentially subject to a greater penalty for using a paper clip to finish smoking the butt, than for possession of the marijuana itself.

The description of a "miniature cocaine spoon" does not give any precision to the definition of drug paraphernalia. The testimony demonstrates that any spoon used for ingesting cocaine is very small. App. 861, 1131, 1203. Does the ordinance intend to proscribe the miniature version of an already very small spoon? Another problem is simply the lack of any objective measure on the size of a spoon which falls within the definition of drug paraphernalia. *Magnani v. City of Ames*, No. 80-229-A (S. D. Iowa, July 21, 1980); *Music Stop, Inc. v. City of Ferndale*, 488 F. Supp. at 393. *But see: Tobacco Road v. City of Novi, supra.* Again, the description of a "miniature cocaine spoon" does not fulfill the purpose of giving specific notice of the items prohibited by the ordinances.

The ordinances have included a list of "logically relevant factors" to be considered by the court, jury, prose-

cutor, and police in determining whether an object is "drug paraphernalia." Plaintiffs argue that several of the factors violate the state and federal rules of evidence. The drafters of the Model Act set forth this list to minimize the risk of arbitrary and discriminatory enforcement. They did not intend the list to supercede any rules of evidence or to interfere with the fact-finding of the trier of fact. App. 1238. It is most likely that the Ohio courts would interpret the ordinance in the manner intended by the drafters of the Model Act.

Nevertheless, two comments are necessary on the proof of an offense under the drug paraphernalia ordinances.[24] First, it is most clear, from our previous discussion of design characteristics, that the defendant's intent for another person to use an item for the ingestion of controlled substances cannot be inferred from the item itself. Witnesses declared numerous times that the intended use of an object could be inferred from the object itself. App. 850-51, 857-59, 861-62, 865, 867, 869, 878-79, 1137-39, 1186. However, because the objects have many lawful uses, and because the design characteristics do not distinguish objects intended for lawful use from objects intended for unlawful uses, the object by itself does not provide any basis for an inference of its intended use. Intent can be inferred from the defendant's statements to a purchaser, the manner in which the defendant display or advertised an item, or the instructions given by the defendant on the use of an item with drugs.

A second flaw in the list of "logically relevant factors" is the potential arrest, prosecution, or conviction of a person on the impermissible theory of guilt by association. *See*

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24. We agree with the district court, for the reasons stated by the district court, that the factor of being a "legitimate supplier" is both vague and overbroad. This factor has been deleted from all three ordinances.

Templeton v. United States, 151 F.2d 706 (6th Cir. 1945). The factors include the proximity in time and space to a direct violation of the drug laws or to the presence of controlled substances, the statements of others, and the advertising of others. Thus, a retailer, for example, to avoid arrest, prosecution, or conviction, must continuously police the national and local media and the activities and statements of persons in the area of his store. The retailer could be safe from arrest on Monday morning when no one congregated near his store or the local narcotics dealer was on the other side of town, yet be very susceptible to arrest Monday afternoon when, unknown to the retailer, the narcotics dealer arrived around the corner from his store, attracting a group of persons who bought marijuana or other controlled substances and then came into his retail store to buy rolling papers, alligator clips, or pipes. In short, the ordinances permit events beyond the control of the retail owner to determine his guilt. The danger is that the ordinances could be applied to make a crime out of constitutionally protected or innocent conduct because of the actions or statements by persons other than the defendant. It is well established that guilt must be based on personal action, statements, or knowledge, not on association with other persons suspected of criminal conduct. *Sawyer v. Sandstrom,* 615 F.2d 311, 316-17 (5th Cir. 1980).[25] Because Ohio law naturally in-

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25. In *Sawyer,* the petitioner had been convicted under a Dade County, Florida loitering ordinance that made criminal "the act of standing" when "a person . . . knowingly loiters in any place with one or more persons knowing that a narcotic or dangerous drug . . . is being unlawfully used or possessed." The petitioner was convicted for standing next to a drug dealer while the dealer sold narcotics. The petitioner did not have any business association with the drug dealer and knew him only as a friend. The Fifth Circuit held the ordinance to be overbroad, in that it unnecessarily infringed on the First Amendment right of association. More than association with a felon was required to sustain a criminal conviction. *See also, Coates v. City of Cincinnati,* 402 U.S. 611 (1971); *Scales v. United States,* 367 U.S. 203 (1961).

corporates this principle of due process, we need not declare the list of logically relevant factors overbroad on its face. *City of Cincinnati v. Hoffman,* 31 Ohio St. 2d 163, 166, 285 N.E.2d 714 (1972), *cert. denied and appeal dismissed,* 410 U.S. 920 (1973).

(2) Offenses

Plaintiffs levy two attacks on the definition of the substantive offenses. First, plaintiffs contend that the standard of scienter must be "specific intent" to avoid the problem of vagueness. The ordinances provide for "knowledge" as the scienter requirement. Second, plaintiffs argue that the prohibition on advertising is overbroad in its coverage of area and its impact on content.

Scienter may save a statute from vagueness and overbreadth by providing fair notice of proscribed conduct and by distinguishing lawful from unlawful conduct. *Colten v. Kentucky,* 407 U.S. 104 (1972); *City of Columbus v. Schwarzwalder,* 39 Ohio St.2d 61, 313 N.E.2d 798 (1974) (per curiam). However, scienter by itself may not be sufficient to save the constitutionality of a statute. "While the Supreme Court has held that some statutes must fall as impermissibly vague in the absence of a scienter requirement, . . . and while that court has held that the presence of a scienter element may save a statute which otherwise would be unconstitutionally vague, . . . the Supreme Court has never to our knowledge held that the imposition of a scienter element upon a statute necessarily renders the statute's prohibitions sufficiently precise to withstand a vagueness challenge." *Amusement Devices Ass'n v. Ohio,* 443 F.Supp. at 1050-51. *Accord, State v. Young,* 62 Ohio St.2d at 375-78, 406 N.E.2d at 503-505. Therefore, the effect of the scienter standard on the vagueness and overbreadth of a statute must be examined on a case-by-case basis in the context of the particular statute at issue.

The drug paraphernalia ordinances prohibit the delivery or manufacture, the possession with intent to deliver, and the manufacture with intent to deliver of drug paraphernalia, "knowing, or under circumstances where one reasonably should know," that it will be used with controlled substances.[26] The ordinances further make unlawful the placement of any advertisement in any printed publication "knowing, or under circumstances where one reasonably should know," that the purpose of the advertisement, in whole or in part, is to promote the sale of objects intended for use or designed for use as drug paraphernalia." The ordinances do not define "knowledge" or "reason to know." Since municipal ordinances must be consistent with general state law, presumably the definition of "knowing" in Ohio Rev. Code § 2901.22(B) would pertain. According to this definition "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." The drafters of the Model Act would define "knowledge" similarly as "actual knowledge" or awareness of a "high probability" that a certain consequence will follow one's action. App. 1241.

The requirement of knowledge on the part of the defendant, when coupled with use or intended for use in the definition of drug paraphernalia, does provide adequate notice and does sufficiently prevent arrest, prosecution or conviction of persons for innocent activities or mistake. As stated by the district court, "convicting an individual of selling drug paraphernalia under the ordinance requires proof of distribution of an item by an individual who in-

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26. We perceive no due process problems with the prohibition against use of, or possession with intent to use, drug paraphernalia.

tends it for use with illegal drugs knowing that it will be so used. Clearly this is not an innocent transaction." Unlike *Amusement Devices Ass'n v. Ohio,* the knowledge is that of unlawful activities only. 443 F. Supp. at 1051. A person who acts with knowledge that the action will aid in criminal conduct can be held criminally responsible. *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978); *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337 (1952).

Plaintiffs rely primarily on *United States v. Bryant,* 461 F.2d 912 (6th Cir. 1972) and *Screws v. United States,* 325 U.S. 91 (1945) to argue that due process requires proof of specific intent to violate or aid in the violation of the drug laws. Specific intent, in the case of the drug paraphernalia ordinances, would be manufacture, delivery or sale of an item to another person with the intent that that person use the item unlawfully with controlled substances. Both *Bryant* and *Screws* are inapposite. *Bryant* holds that specific intent must be proven in a prosecution for aiding and abetting. Specific intent is necessary in such cases of derivative criminality, as Circuit Judge Learned Hand explained so well in *United States v. Peoni,* 100 F.2d 401 (2d Cir. 1938). However, the drug paraphernalia ordinances do not penalize persons for aiding another person to violate the drug laws. The person faces criminal liability for his own actions, such as sale or manufacture of items defined as drug paraphernalia, combined with knowledge that the individual to whom the drug paraphernalia was delivered will use it to ingest narcotics. *Screws* required proof of specific intent for violations of 18 U.S.C. §§ 241 and 242, because the range of constitutional rights protected by these criminal statutes was constantly changing. 325 U.S. at 104. In contrast, the drug paraphernalia ordinances are self-inclusive, and the problems of vague-

ness must be cured by precisely defining drug paraphernalia and the substantive offense.

Amicus argues, by proposing a hypothetical situation, that the requirement of knowledge is not sufficient to inform a person of the criminality of one's action:

> A saleswoman working in the cosmetics section of a fashionable department store sells a beautiful compact to a well-dressed woman who, pleased with her new purchase, announces that the compact and mirror inside it will be perfect for holding and preparing cocaine. The saleswoman may have fair warning that her *customer* is planning to engage in illegal conduct but because of the vagueness of the Ordinance as to the items covered and the ordinarily innocent nature of the transaction, she in no sense can be said to have fair warning that *her* conduct is criminal.

Amicus Br. of Glassman & Browning, Inc. at 29.

Amicus overlooks the fact that a person is not guilty unless the item falls within the definition of drug paraphernalia. Thus, use or intent to use an item in connection with controlled substances must also be proven. In the hypothetical situation suggested by amicus, the absence of use or intended use by the sales clerk results in the compact not being drug paraphernalia as defined by the ordinances. The definition of drug paraphernalia in terms of "use or intended for use" adds in part the extra measure of protection sought by plaintiffs in arguing for a scienter requirement of specific intent.[27]

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27. We also note that Ohio defines many crimes, such as voluntary manslaughter and felonious assault, in terms of a knowing act. Ohio Rev. Code §§ 2903.03, 2903.11. Whether a legislature requires an intentional act or simply a knowing act is its prerogative so long as the statute gives sufficient notice of the conduct made criminal.

The "reason to know" standard is vague and overbroad.[28] The district court aptly remarked: "Defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individual's ability to perceive rather than his criminal intent provides insufficient guidance to the distributors covered by this subsection and to those persons charged wtih the responsibility of enforcing it." *See also*: *Knoedler v. Roxbury Township*, 485 F. Supp. 990, 993 (D.N.J. 1980). *But see*: *World Imports, Inc. v. Woodbridge Township, supra* at 14-15.[29] Detective Bennett testified that the police would not know how to enforce the "reason to know" standard. App. 742. Because most uses of the outlawed items are lawful and common, the "reason to know" standard is too open-ended and too susceptible to misapplication to satisfy the dictates of due process.[30]

Plaintiffs contend that the prohibition of advertising, which promotes, in whole or in part, the use or sale of drug paraphernalia, unnecessarily infringes on the First Amendment right of free speech. The ordinances are drafted with a broad brush to apply to any person, publisher, printer or advertiser, who places an advertisement in the print media. The ordinances also apply without limitation to the location of the placement of the advertisements or the location at which the advertised items are available. Plaintiffs argue that the ordinances also would proscribe protected speech debating the current drug laws

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28. This issue is not moot on appeal, since the Parma and North Olmsted ordinances still incorporate the "reason to know" standard in § 620.04(c).

29. The district court in *World Imports, Inc.* reasoned that the "reason to know" standard could be proven as well as actual knowledge. However, this reasoning does not respond to the problems of vagueness or overbreadth.

30. The district court correctly decided to sever this phrase from the ordinances.

or extolling virtues of the use of drugs. Defendants reply that the limitations on their organic jurisdiction under state law must be read into the language of the ordinances, and that, consequently, the ordinances do not exceed permissible bounds with respect to the location of the prohibited acts. Defendants argue that the prohibition of advertising is constitutional, because only the advertising of illegal activity is proscribed.

Commercial speech is deserving of First Amendment protection. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 48 U.S.L.W. 4783 (June 20, 1980). However, the different nature of commercial speech from non-commercial speech cricumscribes to some extent the measure of First Amendment protection afforded it. For example, the overbreadth doctrine permitting *jus tertii* and the prohibition against prior restraints have no force in the context of commercial speech. *Id.* at 4785 n. 6, 8; *Friedman v. Rogers,* 440 U.S. 1, 10 (1979). After some initial confusion on the degree of protection to be given commercial speech, the Supreme Court in *Central Hudson Gas & Elec. Corp.* stated the definitive rule:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

48 U.S.L.W. at 4785.

Our first question is whether the ordinances prohibit only unlawful activity.[31] The ordinances forbid the use, sale, or manufacture of drug paraphernalia. Because the force of each ordinance stops at the city limits, the use, sale or manufacture of drug paraphernalia is unlawful only in Parma, Lakewood, and North Olmsted. Consequently, the ordinances may prohibit the placement of advertisements only within the city limits about "drug paraphernalia" available within the city limits. The ordinances, as now drafted, could infringe on protected speech in at least three different ways. First, the ordinances could be enforced against advertisers or publishers who place advertisements in printed media that circulates in other cities as well as Parma, Lakewood, and North Olmsted. Second, the ordinances could prevent the residents of these three cities from receiving information about the availability of items, defined by the ordinances as drug paraphernalia, in other cities that do not prohibit the use, sale or manufacture of those items. *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975). Third, the ordinances' use of the words "promote in part" may allow the ban of speech discussing the reform of drug laws or speech glorifying the drug culture. *See Amusement Devices Ass'n v. Ohio*, 443 F. Supp. at 1051 ("facilitate"). Though the comments to the Model Act indicate that such speech would not be proscribed, the statutory language on its face is not so restricted. Thus, we conclude that the ordinances do penalize protected speech.

The regulatory interest of Parma, Lakewood and North Olmsted in stopping drug abuse is plainly substantial. Al-

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31. The Supreme Court declared in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973): "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." Clearly, advertising about the availability of drug paraphernalia in Parma can be prohibited.

so, the broad regulation would seem to advance this interest directly, though its effectiveness may be questioned. Thus, we arrive at the critical question of whether the broad prohibition is more extensive than necessary to serve this interest. That the ordinances would substantially curtail a broad range of protected speech cannot be disputed. Also, the ordinances clearly reach beyond the city limits. The cities can legitimately protect their citizens from the use, sale, or manufacture of "drug paraphernalia" within city limits. However, an impenetrable wall against the free flow of commercial speech cannot be erected around the cities' residents. The cities' interest in regulation of advertising is limited to preventing the sale of drug paraphernalia inside their municipal boundaries. Their legitimate interest does not include regulating the information heard or read by their citizens about the availability of legal "drug paraphernalia" in other locales. *Bigelow v. Virginia,* 421 U.S. at 827. Hence, the ordinances exceed the scope of the legitimate interest of Parma, Lakewood, and North Olmsted in prohibiting the advertising of drug paraphernalia. As the state courts could not provide a saving construction of the ordinances without substantial rewriting, we must declare this subsection of the ordinances unconstitutional for violating the First Amendment right of free speech.[32]

VI.

The final issue is the propriety of injunctive relief in addition to declaratory relief. Proper regard for the principles of federalism obligate federal courts to grant the relief which will intrude least on the enactment and enforcement of state criminal laws. Yet while sitting in

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32. This section of the ordinances is also vague and overbroad, as discussed above, for its use of the terms "reasonably should know" and "designed for."

equity, a federal court also has the duty of awarding the successful plaintiff full and effective relief. "At the conclusion of a successful federal challenge to a state statute r local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). However, injunctive relief will be granted if plaintiff has made "a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Wooley v. Maynard*, 430 U.S. 705, 712 (1977), *quoting Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95 (1935). *See also Douglas v. City of Jeanette*, 319 U.S. 157, 163-64 (1943). Injunctive relief is often warranted when the plaintiff seeks prospective relief against possible future state proceedings in order to alleviate the present deterrent effect of the state statute or local ordinance on his constitutionally protected or otherwise lawful conduct. *Steffel v. Thompson*, 415 U.S. at 463 n. 12. The crux of the inquiry is a showing of irreparable injury necessitating equitable relief, despite the countervailing values of federalism.

The irreparable injury to the plaintiffs' businesses is unquestionable. They do face a genuine threat of arrest and prosecution if the injunctions were vacated. The threat of enforcement of the ordinances would compel plaintiffs to forego a substantial part of their business. Moreover, the ordinances infringe impermissibility on the protected commercial speech of plaintiffs. Plaintiffs seek only prospective relief against local ordinances that have never been enforced. We have found the ordinances to be constitutionally defective in several significant respects. Therefore, we hold that the award of injunctive relief is necessary to protect plaintiffs' constitutional rights.

The grant of injunctive relief does not reflect any disrespect for the city officials or any concern on our part that the municipalities would not comply with a declaratory judgment. Defendants have exhibited considerable solicitude throughout the proceedings in federal court for the protection of the constitutional rights of plaintiffs. The defendants acted expeditiously to conform their ordinances to the district court's opinion, though their efforts fell a little short of full conformity. We harbor no doubts that the municipal officials will continue to perform their duty to safeguard the public safety and welfare with due respect for the constitutional principles that have served our nation well for over two hundred years.

Our opinion questions not the laudable goals of the cities' elected officials, but the means chosen to implement their goals. We are most cognizant of the serious problem of drug abuse long existing in our nation. We hold only that the drug paraphernalia ordinances fail the test of precision demanded by the First and Fourteenth Amendments of the Constitution.

V.

The judgment of the district court is reversed and the case is remanded for issuance of a permanent injunction prohibiting the enforcement of the drug paraphernalia ordinances in the cities of Parma, Lakewood, and North Olmsted.

ADDENDUM

ORDINANCE NO. 242-79

BY: DORIS KRAWCZYK, GERALD BOLDT, FRANK HOUDEK, EVELYN KOPCHAK, JACK KRISE, VICTOR LABUTTA, JOSEPH MOLODEC, WILLIAM OBUCH

AN ORDINANCE ENACTING NEW SECTIONS 620.01(dd) AND 620.04 TO THE CODIFIED ORDINANCES OF THE CITY OF PARMA, PROHIBITING THE SALE OF DRUG RELATED PARAPHERNALIA, AND DECLARING AN EMERGENCY

WHEREAS, this Council has become aware of and is concerned over the general proliferation of "head shops" engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council finds that such establishments serve only to entice young people to abuse substances which are known to be harmful and unsafe for human consumption; and

WHEREAS, this Council finds that this situation has created a problem of such large proportion as to necessitate further legislation on the subject; Now, Therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PARMA, STATE OF OHIO:

Section 1. That Codified Ordinance 620.01, as enacted by Ordinance 228-75, passed February 2, 1976, is hereby amended by adding the following language:

. . .

"620.01 DEFINITIONS.

(dd) (1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are

used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and weeds from, or in otherwise cleaning or refining, marihuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as marihuana cigarette, that has become too small or too short to be held in the hand;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air-driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers;

2. In determining whether an object is "Drug paraphernalia," a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

. . ."

Section 2. That there is hereby enacted a new section 620.04 of the Codified Ordinances of the City of Parma which shall read as follows:

"620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIS.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) Any person 18 years of age or over who violates paragraph (b) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree."

Section 3. That Section 620.04 of the Codified Ordinances, as enacted by Ordinance 228-75, passed February 2, 1976, be, and hereby it is, repealed.

Section 4. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and welfare of the City of Parma, and for the further reason that sale and use of drug paraphernalia is a presently-existing and serious danger to youths which requires immediate regula-

tion, and this Ordinance shall become immediately effective upon receiving the affirmative vote of two-thirds of all members elected to Council and approval of the Mayor, otherwise from and after the earliest period allowed by law.

PASSED: January 7, 1980 /s/ Kenneth G. Kuczma
PRESIDENT OF COUNCIL

ATTEST:
/s/ Bernard J. Survoy
CLERK OF COUNCIL

APPROVED: January 9, 1980
/s/ John Petruska
MAYOR, CITY OF PARMA, OHIO

FILED WITH THE MAYOR: January 9, 1980

MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT IN RECORD REVOLUTION NO. 6, INC. v. CITY OF PARMA, ET AL.

(Filed April 14, 1980)

CASE NO. C80-38

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RECORD REVOLUTION NO. 6, INC.,
Plaintiff,

v.

CITY OF PARMA, OHIO, *et al.*,
Defendants.

Judge John M. Manos

MEMORANDUM OF OPINION

On January 10, 1980 the plaintiff, Record Revolution No. 6, Inc., filed this action under 42 U.S.C. § 1983 challenging the constitutionality of City of Parma Ordinance No. 242-79, an ordinance regulating the distribution, advertisement and use of "drug paraphernalia." The plaintiff's verified complaint seeks declaratory as well as injunctive relief. This court's subject-matter jurisdiction is based upon 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202. On January 11, 1980 a hearing was held on the motion for a temporary restraining order filed by the plaintiff with its complaint. At the hearing the defendants agreed not to pursue enforcement of the Ordinance until a decision in this case could be reached on the merits. By agreement of

the parties, the court then ordered the preliminary and permanent injunction to be consolidated for hearing. See Rule 65(a)(2), FED. R. CIV. P. On January 28 and 30, 1980 the hearing on the permanent injunction was held and thereafter, in accordance with the schedule set by the court, the plaintiff submitted its post-trial brief on February 15, 1980 and the defendants submitted theirs on February 25, 1980. On February 29, 1980 the City of Lakewood, Ohio, which enacted an ordinance substantially identical to Parma's No. 242-79 on January 21, 1980, filed an *amicus curiae* brief.[1] On March 3, 1980 the plaintiff filed its reply brief. For the reasons discussed below, the court concludes that Parma Ordinance No. 242-79 is constitutional as it is construed herein.

I.

Record Revolution No. 6, Inc. is an Ohio corporation which operates a retail business at 7703 West Ridgewood Drive, Parmatown Mall, Parma, Ohio. The plaintiff displays and advertises various items including recorded and taped music as well as "miscellaneous novelty items." (Complaint, ¶ 1). The defendants are: the City of Parma (a municipal corporation organized under the laws of Ohio), John Petruska (the Mayor of Parma), Andrew Boyko (the Director of Law and Chief Prosecutor of Parma), Francis Szabo (Chief of the Parma Police Department), as well as Kenneth Kuczma, Victor Labutta, Frank Houdek, Joseph Molodec, Evelyn Kopchak, Gerald Boldt, Edward Lonjak, Doris Krawczyk and William Obuch (the members of the Parma City Council).

On January 7, 1980 the Council of the City of Parma, Ohio enacted Ordinance No. 242-79: "An Ordinance Enacting New Sections 620.01(dd) and 620.04 To The Codified Ordinances of The City of Parma, Prohibiting the Sale of Drug Related Paraphernalia." On January 9, 1980 the

Ordinance was signed into law by the city's Mayor, defendant Petruska. Ordinance No. 242-79 provides as follows:

"WHEREAS, this Council has become aware of and is concerned over the general proliferation of "head shops" engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council finds that such establishments serve only to entice young people to abuse substances which are known to be harmful and unsafe for human consumption; and

WHEREAS, this Council finds that this situation has created a problem of such large proportion as to necessitate further legislation on the subject; Now, Therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PARMA, STATE OF OHIO:

Section 1. That Codified Ordinance 620.01, as enacted by Ordinance 228-75, passed February 2, 1976, is hereby amended by adding the following language:

620.01 DEFINITIONS.

. . .

(dd) (1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes or other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air-driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers;

2. In determining whether an object is "Drug paraphernalia," a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitiate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the obejct, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

Section 2. That there is hereby enacted a new section 620.04 of the Codified Ordinances of the City of Parma which shall read as follows:

620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) Any person 18 years of age or over who violates paragraph (b) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held

invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree."

Section 3. That Section 620.04 of the Codified Ordinances, as enacted by Ordinance 228-75, passed February 2, 1976, be, and hereby it is, repealed.

Section 4. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and welfare of the City of Parma, and for the further reason that sale and use of drug paraphernalia is a presently-existing and serious danger to youths which requires immediate regulation, and this Ordinance shall become immediately effective upon receiving the affirmative vote of two-thirds of all members elected to Council and approval of the Mayor, otherwise from and after the earliest period allowed by law."

The parties have stipulated that this Ordinance is based upon the "Model Drug Paraphernalia Act" (hereinafter MDPA) drafted by the Drug Enforcement Administration of the United States Department of Justice.

The MDPA is supplemented by comments which explain its provisions in terms of the drafters' intent. Specifically, the comments indicate that the MDPA was

promulgated at the behest of state authorities to enable them to "cope" with the proliferation of drug paraphernalia. Since it was clearly the intent of the Parma City Council to enact the MDPA, the court will use these comments to interpret the language of the Ordinance.

The plaintiff seeks to have the Ordinance declared invalid and unconstitutional. Its contentions are: (1) that the enactment is inconsistent with the Due Process Clause of the Fourteenth Amendment because it is overbroad (it prohibits commercial speech protected by the First Amendment) and vague; (2) that it is inconsistent with the Equal Protection Clause of the Fourteenth Amendment because it invidiously discriminates against so-called "head shops" and because it is not reasonably related to any legitimate governmental objective; and (3) that it is inconsistent with the Commerce Clause of the Constitution (Article I, Section 8, Clause 3) because it imposes an impermissible burden on interstate commerce. The court will first address the vagueness and overbreadth claims, and then separately evaluate the equal protection and commerce clause arguments.

II.

VAGUENESS AND OVERBREADTH

In *Grayned v. City of Rockford,* 408 U.S. 104, 92 S. Ct. 2294 (1972), the Supreme Court defined the due process doctrine commonly referred to as "void for vagueness" as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelli-

> gence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas are clearly marked."

Id. at 108-09, 92 S. Ct. at 2298-99 (citations omitted). Accordingly, to pass constitutional muster an ordinance must provide notice of the conduct which it proscribes in terms which a person of ordinary intelligence can understand, see, e.g., *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612 (1976); *United States v. Harriss,* 347 U.S. 612, 74 S. Ct. 808 (1954); *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S. Ct. 618 (1939), and provide clear guidelines for law enforcement officers, judges and juries to follow; see, e.g., *Smith v. Goguen,* 415 U.S. 566, 94 S. Ct. 1242 (1974); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S. Ct. 839 (1971); *Coates v. City of Cincinnati,* 402 U.S. 611, 91 S. Ct. 1686. Moreover, if First Amendment interests are affected, a precise ordinance "evincing a legislative judgment that *certain specific conduct* be . . . proscribed," *Edwards v. South Carolina,* 372 U.S. 229, 236, 83 S. Ct. 680, 684 (1963), assures the court that the city council has weighed the ordinance's impact upon First Amendment interests and determined that other governmental policies compel reg-

ulation. *Garner v. Louisiana,* 368 U.S. 157, 200, 202, 82 S. Ct. 248, 271-72 (1961) (Harlan, J., concurring). See *Grayned v. City of Rockford,* 408 U.S. at 109, n. 5, 92 S. Ct. at 2299.

The vagueness doctrine does not invalidate every ordinance that could have been drafted more precisely. *The Flipside, Hoffman Estates v. Village of Hoffman Estates,* ..... F. Supp. ..... (N.D. Ill.; Slip Op. No. C78-2114, 2/11/80). Reasonableness, not absolute certainty of draftsmanship, is required. *Tobacco Road v. City of Novi,* ..... F. Supp. ..... (E.D. Mich.; Slip Op. No. C79-71000, 6/21/79). Many ordinances are inherently ambiguous, because "[i]n most English words and phrases there lurk uncertainties." *Robinson v. United States,* 324 U.S. 282, 286, 65 S. Ct. 666, 668 (1945). As the Court noted in *Boyce Motor Lines v. United States,* 342 U.S. 337, 72 S. Ct. 329 (1952):

> [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

The test is whether the ordinance presents "ascertainable standards of guilt." *Winters v. New York,* 333 U.S. 507, 68 S. Ct. 665 (1948). In *United States v. Petrillo,* 332 U.S. 1, 7, 67 S. Ct. 1538, 1542 (1947), the Court stated:

> That there may be marginal cases in which it is difficult to determine the side of the line on which a

> particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense. . . . [T]he Constitution does not require impossible standards.

The doctrines of vagueness and overbreadth are related: "overbroad laws, like vague ones, deter privileged activity." *Grayned v. City of Rockford,* 408 U.S. at 114, 92 S. Ct. at 2302. However, "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Id.* The plaintiff claims that subsection 620.04(c) of the Ordinance is overbroad because it unduly interferes with commercial speech protected by the First Amendment. As this court noted in *Kucinich v. Forbes,* 432 F. Supp. 1101, 1115 (N.D. Ohio 1977), in order for a statute or ordinance to be unconstitutionally overbroad it must, on its face: (1) restrict speech or other conduct protected by the Constitution of the United States; and (2) the municipalities' interest in restricting the conduct must be insufficient in comparison to the encroachment on the constitutional right involved or, if a legitimate municipal interest exists to justify the restriction, the ordinance must fail to employ the narrowest means consistent with the furtherance of that interest. See *Elrod v. Burns,* 427 U.S. 347, 96 S. Ct. 2673 (1976); *Kusper v. Pontikes,* 414 U.S. 51, 94 S. Ct. 303 (1973). The crucial question, then, is whether the Ordinance sweeps within its prohibitions protected speech which may not be punished.

To determine whether a legislative enactment meets these constitutional requirements the same rules of construction apply whether it is a statute or an ordinance. *The Flipside, Hoffman Estates v. Village of Hoffman Estates, supra* (citing *Martin v. King,* 417 F.2d 458, 461 (10th Cir. 1969). Among the rules of construction is the rebuttable presumption that legislative enactments are valid

unless it is shown that the statute or ordinance in question bears no rational relationship to a legitimate legislative purpose. *United States v. Kiffer,* 477 F.2d 349 (2d Cir. 1973), *cert. denied,* 414 U.S. 831. However, a stricter standard of review is required if the enactment infringes upon the exercise of a fundamental right. *Roe v. Wade,* 410 U.S. 113 (1973). The court must also bear in mind that "[t]he Office of Judges is always to make such construction as to suppress the mischief and advance the Remedy; and to suppress subtle Inventions and Evasions for Continuance of the Mischief." *United States v. Second National Bank of North Miami,* 502 F.2d 535, 541 (5th Cir. 1974), *cert. denied* 421 U.S. 912 (1975) (quoting *Heydon's Case,* 3 Co. 7a, 7b; *Magdalon College Case,* 11 Co. 666, 736b). Moreover, the court should favor an interpretation of the enactment which supports constitutionality. *Screws v. United States,* 325 U.S. 98, 65 S. Ct. 1031 (1945). Finally, all laws should receive a sensible construction. *United States v. Ryan, supra* at 175, 52 S. Ct. at 68. As the Court held in *United States v. Ryan,* 284 U.S. 167, 52 S. Ct. 65 (1931):

> A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.

Id. at 175, 52 S. Ct. at 68 (citations omitted).

A. DEFINITION

The key to the Parma Ordinance is the definition of drug paraphernalia contained in section 620.01(dd)(1). Each of the criminal offenses defined in subsections 620.04 (a)-(d) refer to "drug paraphernalia," thereby incorporating the definition by reference. The court finds that this definition is not vague.

As the Court of Appeals for the Eighth Circuit observed in *United States v. Johnson,* 541 F.2d 1311, 1315 (8th Cir. 1976), the term " 'paraphernalia' has become a standard vocabulary word in the vernacular of the drug community . . . ." However, drug paraphernalia is difficult to define in constitutionally adequate terms because nearly every item that is used with illegal narcotics also has a more customary and innocent use. The use, manufacture and sale of all such items could not be prohibited constitutionally. *Cf. United States v. Brunnet,* 53 F.2d 219 (W.D. Mo. 1931). Rather, such a blanket prohibition would be so imprecise as to lead to selective enforcement which would be unconstitutional. The Parma Ordinance avoids any such wholesale prohibition by defining drug paraphernalia in terms of the intent of the individual or entity charged with one of the offenses described in § 620.04. As the drafters of the MDPA noted, criminal intent is what distinguishes the paper clip which holds the pages of this memorandum of opinion from an identical clip which is used to hold a marijuana cigarette. The drafters of the Model Act commented as follows:

> To insure that innocently possessed objects are not classified as drug paraphernalia, [the definition] makes the knowledge of *criminal intent of the person in control of an object a key element of the definition.* Needless to say, inanimate objects are neither "good" nor "bad," neither "lawful" nor "unlawful." Inanimate objects do not commit crimes. *But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution.* [The definition] requires, therefore, that an object be used, intended for use, or designed for use in connection

with illicit drugs before it can be controlled as drug paraphernalia.

MDPA, Comment pp. 6-7 (1979) (emphasis added).

As a general rule, a crime consists of two elements: (1) an act or omission, and (2) a state of mind - mens rea. Although the mens rea of an offense may differ from crime to crime, the general state of mind required is an intent to perform the criminal act. Of course, the mens rea and the act must occur simultaneously and the intent must be that of the criminal defendant. Because the definition of drug paraphernalia is referenced in each of the criminal offenses described in this Ordinance, it is an element of each of these offenses. Specifically, the criminal intent used to define drug paraphernalia is an element of the mental state required to convict under this Ordinance. Therefore, the pertinent intent must be that of the individual charged with having committed one of the offenses described in section 620.04(a)-(d). The court concludes that "black-letter" criminal law and the intent of the MDPA draftsmen compel the conclusion that the definition of drug paraphernalia must be interpreted in terms of the criminal defendant's intent and that this construction is reasonable and sensible.

Citing the testimony of Councilwoman Krawczyk, the plaintiff contends that the intent referenced in the definition is that of the purchaser of the item and that the Ordinance is unconstitutionally vague because a person could, for example, be convicted of dealing in drug paraphernalia if the buyer of his product, or a prospective user several times removed from the transaction, intends to use the item to administer illegal drugs. See *NORML v. Sindak,* Slip Op. 16-17, Civil Action No. TH75-142 (S.D. Ind., 2/4/80). Parma, on the other hand, argues that the Ordinance provides adequate notice of its proscriptions

because the relevant intent is that of the seller of the item. The city bases this construction upon cases involving the sale of ingredients used to illegally manufacture liquor[3] which it argues are analogous to regulation of drug paraphernalia since both the ingredients of liquor and the items used to administer drugs have innocent and lawful uses. The court finds that neither of these suggested constructions can be constitutionally applied to all of the offenses defined in the Ordinance.

Whether this Ordinance is vague on its face is a question of law which is exclusively the responsibility of the court to determine. *Cf. United States v. Garber,* 589 F.2d 843, 849 (5th Cir. 1979). As the court stated during the hearing, defendant Krawczyk's interpretation of the Ordinance is not binding on it. As the Supreme Court noted in *Bouie v. City of Columbia,* 378 U.S. 347, 355, n. 5 (1964):

> The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants.

See also *Castaneda-Gonzalez v. Immigration & Naturalization Serv.,* 564 F.2d 417, 424 (D.C. Cir. 1977); *Financial Indemnity Co. v. Cargile,* 32 Ohio Misc. 103, 106 (1972) ("We believe that the meaning of the act must be determined from the words of the statute itself. The court cannot consider what an individual legislator, *even the author* of the bill, states he understood them to mean.").

Defining all drug paraphernalia in terms of the state of mind of the seller of the item, does not solve the problem of transferred criminal intent. For example, if a manufacturer is prosecuted under section 620.04(b) and the

term "drug paraphernalia" is defined in terms of the seller's intent, as Parma suggests, the manufacturer of an innocent item would be subject to criminal punishment because the seller intends it to be used with illegal drugs.[4] The Ordinance regulates the following categories of conduct: use of paraphernalia with illegal drugs, possession of paraphernalia with intent to so use, placement of certain drug paraphernalia advertisements, and manufacture of paraphernalia for sole use with drugs. Therefore, defining all drug paraphernalia in terms of the intent of an individual classifiable in any one of these categories would cause a transferred intent problem whenever the definition was applied to the allegedly criminal conduct of individuals in one of the other categories. For this reason, the court's construction defining drug paraphernalia in terms of the intent of the individual charged with violating the Ordinance, is more reasonable and sensible.

There are three forms of state of mind on which the definition of drug paraphernalia turns: "[A]ll equipment, products and materials of any kind which are (1) *used,* (2) *intended for use,* or (3) *designed for use* in . . . introducing into the human body an [illegal] controlled substance." § 620.01(dd)(1) (emphasis added). The court construes each of these three elements as implying and requiring the existence of general criminal intent by the defendant. Thus, the criminal defendant's voluntary and intentional use of an item with illegal drugs makes it drug paraphernalia within the meaning of this Ordinance. Similarly, if the defendant intends an item for use with illegal drugs or designs it for that use[5] the item is drug paraphernalia. Adding the element of general intent not only narrows the scope of the ordinance, it insures that no one will be convicted because of mistake, accident or other innocent reason. For example, if a person

smokes marijuana from a pipe believing it contains tobacco, he could not be convicted of using drug paraphernalia under section 620.04(a); the pipe is not drug paraphernalia because it was not intentionally used with marijuana. Similarly, if a person smokes tobacco in a water pipe which was designed for use with marijuana, he is not subject to prosecution for using drug paraphernalia because he did not intend to use the pipe to ingest an illegal controlled substance.

As a general rule, if words are not defined in an ordinance and there is "no accumulation of jurisprudence on [their] actual meaning," the court must assume that the legislators used them as they are commonly and ordinarily understood. *United States v. Porter,* 591 F.2d 1048, 1053 (5th Cir. 1979). The only phrase defined in the Ordinance is drug paraphernalia. Moreover, there is no accumulation of jurisprudence applicable to this Ordinance because this is a case of first impression. Therefore, the court concludes that the words "equipment, products or materials," and the words which describe the uses with illegal drugs to which an item can be put (planting, propagating, cultivating, etc.) should be interpreted according to their ordinary dictionary definitions.

The definition of drug paraphernalia, § 620.01(dd)(1) A-L, also includes a description of items which might be intentionally used, intended for use, or designed for use with an illegal substance. Again, it is important to note that the scope of this Ordinance is narrowed because none of the items listed is drug paraphernalia *per se;* only if one of the three forms of the criminal defendant's intent is present, can an item, for purposes of that defendant's prosecution, be drug paraphernalia within the meaning of this Ordinance.[6]

Section 620.01(dd)(2) lists fourteen indicia which law enforcement authorities may use to determine whether an object is "drug paraphernalia." With one exception the court finds that these enforcement guidelines are not vague. The single exception is subpart (K) which provides:

> In determining whether an object is "Drug paraphernalia," a court or authority should consider, in addition to all other logically relevant factors, the following:
>
> . . .
>
> (K) Whether the owner, or anyone in control of the object, is a *legitimate supplier* of like or related items to the community, such as a licensed distributor or dealer of tobacco products. . . .

Section 620.01(dd)(2)(K) (emphasis added). This portion of the Ordinance fails the second test of vagueness; the reference to "legitimate" suppliers creates a danger of arbitrary and discriminatory enforcement. See *Grayned v. City of Rockford, supra* Because the provisions of this Ordinance apply to *all* who use, distribute or advertise even an innocent item with the requisite intent, the term "legitimate" supplier is imprecise and misleading. Accordingly, subpart (K) is severed from the Ordinance pursuant to section 620.04(g), the severability clause.[7] The other subparts of section 620.01(dd)(2) provide useful guidelines that policemen may use to make a probable cause determination, and that the trier of fact may use, to the extent the applicable rules of evidence permit, to determine whether the elements of an offense have been proved.

B. OFFENSES

The court concludes that the offenses described in section 620.04 are neither vague nor overbroad, except for the 'reasonably should have known' standards of knowledge which must be severed from subsections (b) and (c),

1 SECTION 620.04(a)

This subsection proscribes the intentional use of drug paraphernalia with illegal drugs as well as the possession of such items with the intent to use them with illegal drugs. To convict an individual of using drug paraphernalia in violation of 620.04(a), the City of Parma must prove each of the following elements beyond a reasonable doubt:

(1) that the defendant used a piece of equipment, a product or material to plant propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body an illegal controlled substance; and

(2) that the defendant acted with the general intent to do the act and not because of mistake, accident or any other innocent reason.

These elements are based upon the definition of drug paraphernalia which is incorporated by reference into subsection (a).[8] As previously described, the pertinent definitional intent in this instance is that of the alleged user.

To convict an individual of the offense of possessing drug paraphernalia with intent to use it with illegal narcotics, the City of Parma must prove each of the following elements beyond a reasonable doubt:

(1) that the defendant possessed a piece of equipment, a product or material; and

(2) that the defendant intended to use[9] the item he possessed to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body an illegal controlled substance.

In accordance with the rules of construction regarding undefined words, the court concludes that the word "possess," as it is used in this Ordinance, means:

> The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

Black's Law Dictionary, p. 1325 (4th ed. 1968). It is clear that this subsection requires more than innocent possession of an object which could be used as drug paraphernalia. For example, although the definition of the word possess is broad enough to include items displayed by a retailer, merely holding an item in inventory is not a violation of subsection (a). Such a retailer would not be subject to prosecution for the possession offense defined in this subsection unless he intended to use the displayed item with illegal drugs himself. "Possession with intent to use" requires that the possessor be the individual who intends to use the item with illegal drugs, not some third party. Moreover, innocent possessors of ordinary items that *could* be used with illegal drugs are not subject to prosecution under subsection (a).

The court concludes that this subsection gives persons of average intelligence fair notice of the conduct which is forbidden, *United States v. Harriss, supra,* and that it is drawn narrowly enough to avoid arbitrary arrests. *Grayned v. City of Rockford, supra.*

2. SECTION 620.04(b)

This subsection applies to individuals who facilitate the use of controlled substances by distributing an item knowing that it will be used with illegal drugs. There are two standards of knowledge used in the Ordinance: (1) actual, and (2) constructive knowledge. The court finds that the "reasonably should have known" standard of constructive knowledge is unconstitutionally vague and that it must be severed from this subsection. The remaining portion of the subsection proscribes, in constitutionally adequate terms, the intentional delivery and sale of drug paraphernalia, as well as its manufacture and possession with intent to deliver or sell, by individuals with knowledge that the item will be used with illegal drugs.

Criminal intent has traditionally been defined to include actual knowledge: one is said to intend a consequence if (a) he desires that his act cause certain consequences, or (b) he actually knows that the consequences are substantially certain to result from his acts. La Fave & Scott, *Criminal Law*, § 28 (1st ed. 1972) (citing Williams, *Criminal Law: The General Part*, §§ 16, 18 (2d ed. 1961).). This subsection reflects the legislative judgment that an individual who acts (distributes drug paraphernalia) intend the result of his act (that the item actually be used with illegal drugs) when he knows that that result is practically certain to follow from his conduct; whether or not the defendant desires that result is irrelevant. Clearly, the element of actual knowledge adequately protects a criminal defendant's due process rights. For example, to commit the offense of selling paraphernalia under this subsection an individual must act purposely to sell drug paraphernalia and he must act with knowledge that it *will be used* with illegal drugs.

On the other hand, it is constitutionally impermissible to impute to a criminal defendant knowledge of the illegal use of items which are normally and innocently used every day by a variety of individuals. Construing a drug paraphernalia ordinance that proscribed the sale of items which the seller "had reason to believe" would be used with certain illegal drugs, Judge Sarokin of the District of New Jersey aptly described the problem caused by this standard as follows:

> [T]he seller faced with the Roxbury Ordinance has to . . . determine what the customer intends to do with the items of purchase. Certainly in a case where the purchaser announces his or her intention to utilize the paraphernalia purchased for an illegal purpose, the seller would be placed in no dilemma; however, the question arises as to what would create a reasonable belief in the mind of the seller in the absence of such an unlikely announcement by the purchaser. Does the purchaser's age, sex, mannerisms or dress afford to a seller reason to believe that the paraphernalia will be used for an illegal purpose? Or should the nature of the purchaser's companions or the items he or she carries be determinative? These questions indicate the difficulty that a merchant, as well as a law enforcement officer, would have, in the absence of an admission by the purchaser, in determining what gives rise to a reasonable belief that a purchaser intends to utilize the paraphernalia for an illegal purpose. An additional concern is whether it is proper to charge an owner of a department store, or any other store, with responsibility for a sales clerk's determination as to whether the person purchasing an item, especially an innocuous one such as a weight scale or a spoon, intends to utilize it for some improper and illegal purpose.

Knoedler v. Roxbury Township, ... F. Supp. ..... (Slip. Op. C80-228; D.N.J. 1980). Accordingly, the court concludes that the standard of constructive knowledge as applied in this Ordinance is unconstitutionally vague. Defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individual's ability to perceive rather than his criminal intent provides insufficient guidance to the distributors covered by this subsection and to those persons charged with the responsibility of enforcing it. The court further finds that the constructive knowledge standard is distinct from the other portions of this subsection and therefore severable from it pursuant to section 620.04(g), the severability clause. See *Champlin Refining Co. v. Corporation Commission, supra.*

It is important to note, that this holding does not restrict the introduction of relevant evidence from which the trier of fact can determine knowledge. The fact of knowledge, just as any other fact in a case, may be proved by any admissible evidence which the court finds relevant. See, e.g., *Reisman v. United States,* 409 F.2d 789 (9th Cir. 1969). If the applicable rules of evidence so provide, state of mind may be shown by circumstantial evidence. *United States v. Jewell,* 532 F.2d 697 (9th Cir.), *cert. denied* 426 U.S. 951, 96 S. Ct. 3173 (1976); *United States v. Bright,* 517 F.2d 584 (2d Cir. 1975). For example, in indicia of drug paraphernalia listed in section 620.01(dd)(2), as previously construed by the court, may also be relevant evidence of knowledge. Moreover, the element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately disregarded or consciously ignored knowable facts. *United States v. Callahan,* 588 F.2d 1078, *reh. denied* 591 F.2d 1343 (5th Cir. 1979); *United States v. Gentile,* 530 F.2d 461 (10th Cir.), *cert. denied* 426 U.S. 939, 96 S. Ct. 2651 (1976).

Therefore, to convict an individual charged with delivering, or selling, drug paraphernalia in violation of section 620.04(b) the City of Parma must prove each of the following elements beyond a reasonable doubt:

(1) that the defendant delivered (sold) a piece of equipment, a product or material;

(2) that the defendant delivered (sold) the item (a) intending it for use with illegal narcotics, (b) having designed it himself for use with illegal narcotics, or (c) having intentionally used it himself with illegal narcotics; and

(3) that the defendant delivered (sold) the item with knowledge that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body an illegal controlled substance.

The offenses of possession and manufacture with intent to deliver or sell defined in subsection 620.04(b) include an additional element: the intent to deliver or sell. The court finds that these offenses have the following essential elements:

(1) that the defendant manufactured (possessed) a piece of equipment, a product or material;

(2) that the defendant manufactured (possessed) the item (a) intending that it be used with illegal drugs, (b) having designed it himself for use with illegal drugs, or (c) having intentionally used it himself with illegal narcotics;

(3) that the defendant intended to deliver or sell this item; and

(4) that the defendant manufactured (possessed) the item with knowledge that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body an illegal controlled substance.

The first element of each offense is the act portion of the crime. The court finds that the terms used to describe the proscribed acts (delivery, sale, manufacturing and possession) are clear. Subsection (b) of the MDPA refers only to the offenses of delivering drug paraphernalia, and possessing or manufacturing it with intent to deliver. The offenses of selling drug paraphernalia, and possessing or manufacturing it with intent to sell which appear in the Ordinance represent a modification of the Model Act. The MDPA comments indicate that its authors intended the term "deliver" to have the same meaning it has in the Uniform Controlled Substances Act: the actual, constructive or attempted transfer from one person to another, whether or not there is an agency relationship. MDPA, Comment, p. 11 (1979). Because the term "sell" is not defined in the Ordinance, the court must assume that the Council intended it to have the commonly understood meaning. *United States v. Porter,* 591 F.2d 1048, 1053 (5th Cir. 1979); *Sheehan v. Scott,* 520 F.2d 825, 829 (7th Cir. 1975). Therefore, the court finds that Parma used the term in its general sense to describe a barter transaction made by any person, whether as principal, proprietor, agent, servant, or employee. In the absence of any relevant testimony or argument, the court finds that the term "deliver" encompasses the sale of drug paraphernalia and that Parma added the term "sale" to express clearly its legislative judgment that such transactions be covered.

The overlap of these terms is not a constitutional defect. Each term provides adequate notice of the proscribed conduct and clear enforcement guidelines. The act of manufacturing refers to the entire process by which an object is readied for sale in open commerce, "including designing, fabricating, assembling, packaging and labeling." MDPA, Comment, p. 11 (citing *Danovitz v. United States*, 281 U.S. 389, 50 S. Ct. 344 (1930). Possession has already been defined. See p. 13, *supra*.

The second element of each offense expresses the requirement that the item which the defendant delivered, sold, possessed or manufactured be drug paraphernalia. As previously discussed, this element is not unconstitutionally vague.

The Court concludes that the means chosen by Parma to regulate the distribution of drug paraphernalia in this subsection are narrow and clear. Two forms of drug paraphernalia distribution are proscribed: actual and intended distribution. The offenses of delivering and selling drug paraphernalia regulate the actual distribution of such items. The offenses of possession and manufacture of drug paraphernalia with intent to deliver or sell regulate its intended distribution. Mere possession or manufacture of items which could constitute drug paraphernalia is not a crime. The final element of each of the offenses, that the actual or intended distribution be done knowingly, further limits the impact of this subsection.

The element of actual knowledge and the definition of drug paraphernalia minimize the impact of this subsection on innocent distribution of items. As a general rule, an act is done knowingly if it is done voluntarily and intentionally.[10] Requiring proof beyond a reasonable doubt that an act was done knowingly insures that no one will be convicted for an act done because of mistake,

or accident, or other innocent reason. See, e.g., Devitt & Blackmar, *Federal Jury Practice and Instructions* § 14.04 (3d ed. 1977) (citations in annotation). For example, convicting an individual of selling drug paraphernalia under the Ordinace requires proof of distribution of an item by an individual who intends it for use with illegal drugs knowing that it will be so used. Clearly, this is not an innocent transaction. The court is unpersuaded by the plaintiff's argument that the Ordinance is vague because it does not distinguish the innocent sale of ordinary items from their sale as drug paraphernalia. As the Fourth Circuit noted in *Backun v. United States,* 112 F.2d 635 (4th Cir. 1940):

> To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale. 112 F.2d 635 (4th Cir. 1940).

The Ordinance does not define the degree of proof required to establish knowledge that a distributed item

will be used with illegal drugs. However, the MDPA comments provide, in pertinent part, as follows:

> The knowledge requirement of Section [620.04] is satisfied when [a defendant]: (i) has actual knowledge an object will be used as drug paraphernalia; [or] (ii) is aware of a high probability an object will be used as drug paraphernalia. . . ."[11]

Therefore, to prove knowledge it is not necessary for the prosecution to prove that the defendant was absolutely certain that the item he sold would be used with narcotics; proof beyond a reasonable doubt of substantial certainty of the result is all that is required. See also Williams, *Criminal Law: The General Part* §§ 16, 18 (2d ed. 1961); Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 910-11 (1939). As the Fifth Circuit noted in *United States v. Stephens*, 569 F.2d 1372, 1374 (5th Cir. 1978):

> It is not necessary for the prosecution to 'perform the impossible task of obtaining a print-out of the defendant's state of consciousness at the moment of sale. But, however proved, actual knowledge itself must be shown beyond a reasonable doubt.

Although proof of absolute certainty is not necessary, it is not sufficient to show that the defendant may have suspected or thought that the items would be so used.[12]

3. SECTION 620.04(c)

Subsection 620.04(c) proscribes placing printed advertisements which promote the sale of drug paraphernalia. The court finds that this subsection, as it is construed herein, is neither vague nor overbroad.

As previously noted, subsection (c) incorporates the definition of drug paraphernalia previously construed by the court. Because the offense applies to the conduct

of placers of advertisements, it is the advertiser's intent which must be examined to determine whether the item advertised is drug paraphernalia. However, unlike the references in subsections (a) and (b), subsection (c) refers specifically to only two of the three general mens rea elements of the definition of drug paraphernalia; "designed for use" and "intended for use" are referenced but "used" is not. In this manner, the definition of drug paraphernalia in the context of advertising is more narrowly drawn than the general definition set forth in section 620.01(dd)(1). Accordingly, the essential elements of the offense of placing drug paraphernalia advertisements are:

> (1) the defendant placed an advertisement in a newspaper, handbill, or other publication;
>
> (2) the purpose of the advertisement, in whole or in part, is to promote the sale of equipment, products, or materials which the defendant designed or intends for use with illegal drugs; and
>
> (3) the defendant knew at the time he placed the advertisement that its purpose was to promote the sale of equipment, products or materials which he designed or intends for use with illegal drugs.

The MDPA Comments indicate that the terms "any person" and "place" in the Ordinance refer to "anyone who prints or publishes paraphernalia advertisements, and to anyone who causes these advertisements to be printed or published."[13] For example, if the requisite intent of each can be proved, both the retailer who places the advertisement and the publisher of it are subject to prosecution under the Ordinance. Of course, the impact of this Ordinance is limited by the implicit jurisdictional limitations imposed upon municipalities: "Municipal ordinances are necessarily local in their application. Usually they

operate only in the territory of the municipality and can have no force beyond it." McQuillan, 5 *Municipal Corporations*, § 15.30, p. 108 (3d ed.) Specifically, the Ohio Constitution provides that the exercise of Parma's governmental powers cannot extend beyond its geographical limits: "Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws." Ohio Constitution, Article 18, Section 3. *City of Cincinnati v. Alexander*, 54 Ohio St. 2d 248 (1978); *Prudential Co-Operative Realty Co. v. City of Youngstown*, 118 Ohio St. 204 (1928); *State, ex rel. Kahler-Ellis Co.*, 69 Ohio L. Abs. 305 (1954). A further limitation on the scope of this Ordinance is that Parma lacks authority to regulate the jurisdiction of its municipal courts which are established by state law. *Cupps v. City of Toledo*, 170 Ohio St. 144 (1959).

The plaintiffs also allege that the ban on advertising imposed by subsection (c) is unconstitutionally overbroad because it prohibits the dissemination of information regarding lawfully sold products in violation of the First Amendment. The court finds that the speech which the Ordinance restricts is not protected by the Constitution because it solicits illegal conduct. Since constitutionally protected speech is not prohibited, the Ordinance is not overbroad.

Subsection (c) proscribes certain commercial speech by making it a crime for any person to place a printed commercial advertisement which he knows is designed to promote the sale of drug paraphernalia. The advertisements affected by this subsection are purely commercial. Neither subsection (c) nor any other provision of the Ordinance proscribes dissemination of factual material of clear

public interest. Moreover, communication of information, expression of opinions, and recitation of grievances are not regulated. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). Expression which assails controlled substance laws, extolls the attractions of unlawful substances, or glorifies the drug culture is not restricted. *Cf. High Ol' Times v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978).

Since the Supreme Court's decision in *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222 (1975), it has been clear that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 96 S. Ct. 1817, 1825 (1976). Speech which is conveyed in a form that is sold for profit is also protected even if it involves a solicitation to purchase or otherwise pay or contribute money. *Id.*

However, speech, commercial or otherwise, which solicits illegal activity is not protected by the First Amendment. *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 93 S. Ct. 2553 (1973). In *Pittsburgh Press* the Supreme Court sustained an ordinance that had been construed to prohibit newspapers to carry "purely commercial" help-wanted advertisements in sex-designated columns except where the distinction is based upon a bona fide occupational exemption. The Court discussed the illegality of the advertised activity in the following terms:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent

> when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Id. at 389, 93 S. Ct. at 2561. In this case the commercial activity is the sale, use, possession and manufacture of drug paraphernalia, which is illegal by operation of subsections 620.04(a) and (b), as construed by this court. Moreover, the court is fully aware of the serious problems caused by rampant drug abuse and that the ready availability of drug paraphernalia is an inducement to illegal drug use. For these reasons, the Parma Ordinance is a reasonable exercise of that municipality's "inherent power" to provide for the health, safety, morals, and welfare of its people. See *Poe v. Ullman*, 367 U.S. 497, 539, 81 S. Ct. 1752, 1775 (1961) (Harlan, J., dissenting). Therefore, the court concludes that subsection (c) is constitutional; the printed advertisements are unprotected by the First Amendment because their restriction is incidental to a valid limitation on illegal economic activity.

Despite the illegality of the commercial speech regulated, the plaintiff argues that subsection (c) is overbroad because it proscribes advertisement of drug paraphernalia which is available outside of Parma and therefore legal. The plaintiff relies upon *Bigelow v. Virginia*, 421 U.S. 809, 95 S. Ct. 2222 (1975). In *Bigelow* the Court reversed a conviction for violation of a Virginia statute that made the circulation of any publication which encouraged or promoted the processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper an advertisement announcing that abortions were legal in New York and offering the services of a referral agency in that state.

The constitutionality of statutes or ordinances may be determined from the law "as written, or authoritatively

construed." See, e.g., *Miller v. California*, 413 U.S. 15, 24-25, 93 S. Ct. 2607, 2614-2615 (1973). In light of *Bigelow*, this court construes subsection (c) to proscribe only the placement of advertisements which indicate that drug paraphernalia is available in Parma, Ohio. The subsection is therefore constitutional, as construed herein.

4. SECTIONS 620.04(d), (e), (f), and (h).

These four subsections cover (1) the special offense of delivering drug paraphernalia to a minor (§ 620.04(d)), (2) the inapplicability of the Ordinance to dentists, pharmacists, medical doctors and veterinarians acting pursuant to Ohio law (§ 620.04(e)), (3) the forfeiture of drug paraphernalia (§ 620.04(f)), and (4) the penalties which may be imposed for violating the provisions of this Ordinance. The court finds that each of these provisions is valid.

(1) The special offense described in section 620.04(d) contains the same elements as the offense of knowingly delivering drug paraphernalia (§ 620.04(b)) which the court previously construed to be constitutitonal, plus the additional element that the deliverer of the item be 18 or over and the recipient be 18 or under. If construed as the court interpreted section 620.04(b), this provision is neither vague nor overbroad.

(2) Although subsection (e) exempts individuals pursuing a profession according to state law, it does not absolve them from liability under the Ordinance if they violate it by acting outside their authorized practices. The court finds that this limitation is rational and that this offense is not vague.

(3) Subsection 620.04(f) authorizes Parma to retain and destroy drug paraphernalia seized during a criminal investigation. This civil forfeiture provision, which entails

a proceeding against property independent of any criminal proceedings against individuals, is also constitutionally valid. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080 (1974).

(4) Fixing punishment is a legislative function with which the court will not interfere unless the punishment prescribed is manifestly cruel and unusual or grossly disproportionate to the offense. *Kasper v. Brittain,* 245 F.2d 92 (6th Cir. 1957), *cert. denied* 355 U.S. 834 (1957); *Kreiling v. Field,* 431 F.2d 502 (9th Cir. 1970). The court finds that the potential punishment provided in subsection 620.04(h) is reasonable and that it is neither so arbitrary nor severe as to constitute cruel and unusual punishment.

III.

EQUAL PROTECTION

The plaintiff argues that the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment because it is directed only at "head shops," and not the many other establishments in Parma which distribute, sell or advertise items which are identical or functionally equivalent to the merchandise sold by it. The court concludes that this argument is meritless for two reasons. First, the basic premise of the argument is false; the Ordinance applies to *all* users, distributors or advertisers of drug paraphernalia who act with the requisite intent, not just "head shops." Second, the Ordinance does not violate the equal protection clause because it is rationally related to a legitimate municipal goal.

If an ordinance restricts a fundamental interest, such as voting, *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966), or involves a suspect classification, such as race, *Regents of the University of California v. Bakke,* 436 U.S.

265 (1978), the court must carefully scrutinize it to determine whether the municipality has a compelling interest in the end it seeks to attain and whether the means used are closely congruent to that end. See, e.g., *In re Griffiths,* 413 U.S. 717 (1973). In this case neither a fundamental right nor a suspect classification is involved. Therefore, traditional equal protection analysis provides the standard of review. As the Supreme Court stated in *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S. Ct. 2513 (1976):

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines in the local economic sphere, it is only invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

Parma's authority to regulate the use of controlled substances " 'is too firmly established to be successfully called in question.' " *Robinson v. California,* 370 U.S. 660, 664, 82 S. Ct. 1417, 1419 (1962). Because the city's regulation of the use, distribution or advertisement of drug paraphernalia is rationally related to this manifestly legitimate municipal interest, *Tobacco Road v. City of Novi, supra,* the plaintiff's equal protection argument is unpersuasive.

IV.

THE COMMERCE CLAUSE

Finally, the plaintiff claims that the Ordinance is inconsistent with the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, because it imposes an impermissible burden on interstate commerce. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), wherein a unanimous Court adopted the following statement of the applicable law.

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co. v. Arizona*, 325 U.S. 761 . . . .

Pike, therefore, suggests a three-part test: first, the local legislation must serve a legitimate local public interest; second, it must affect interstate commerce only incidentally; and, third, if the first two tests are met, the court must then determine whether the legitimate local purpose justifies the law's impact on interstate commerce. See

Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *cert. granted* ..... U.S. ..... (1979), 47 U.S.L.W. 3450, No. 78-759 (Jan. 9, 1979). Applying this test, the court concludes that the Parma Ordinance does not impermissibly burden commerce.

As noted earlier, the object of the Ordinance, the control of drug abuse, is clearly a legitimate municipal concern. Therefore, the first portion of the *Pike* test is met.

The second portion of the test is also met. The court recognizes that because nearly all of the items used with illegal drugs have legitimate uses, the sale of such items could not be prohibited for all purposes. *Knoedler v. Roxbury Township, supra.* However, the Parma Ordinance regulates actual use, intended use, and knowing distribution or advertising of drug paraphernalia. These elements limit the scope of this Ordinance and minimize its impact on interstate commerce. Accordingly, the court concludes that the Ordinance "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. . . ." *Pike v. Bruce Church, Inc., supra* at 142.

In *Procter & Gamble Company v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975), *cert. denied* 421 U.S. 978 (1975), the Seventh Circuit described as follows the balancing test which the court must undertake to fulfill the third criteria of the *Pike* standard:

> It is our view, however, that if the burden on interstate commerce is slight, and the area of legislation is one that is properly of local concern, the means chosen to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing

> proof. If it is determined that this presumption should be applied, no further balancing need be undertaken. The end has already been deemed legitimate and the burden on interstate commerce slight. If the legislation is a reasonable means to that end it is constitutional.

Id. at 76 (footnote omitted). In the absence of clear and convincing proof to the contrary, the court concludes that the Ordinance is a reasonable means of protecting the public welfare which does not violate the Commerce Clause.

V.

CONCLUSION

The case law in this area indicates that municipalities across the nation have recognized the problem of proliferating drug paraphernalia, and have sought, with limited success, to enact constitutionally sound legislation to cope with it. This order should not be interpreted to mean that the Parma Ordinance is the wisest or most effective way to cope with the problem. The court's conclusion is that the Ordinance, as it is construed herein, is constitutional.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

FOOTNOTES

1. On March 3, 1980 the plaintiff filed a motion to strike the brief submitted by Lakewood. The motion is denied.

2. In its complaint the plaintiff also contends that the Ordinance is inconsistent with the Fourth Amendment because it encourages search and seizure with less than probable cause, that it violates the Impairment of Contracts Clause of the Constitution (Article I, Section 10), that it violates the Bill of Attainder Clause of the Constitution (Article I, Section 10), and that it violates the Supremacy Clause of the Constitution (Article VI, Section 2). None of these arguments were briefed by the parties in their post-trial submissions. However, the court will consider them briefly. The court concludes that each of these contentions is without merit.

The plaintiff's Fourth Amendment contention is unpersuasive. There is nothing in the Ordinance which reduces the constitutional requirement that all arrests, searches and seizures be based upon probable cause. *See, e.g.,* Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963).

The Ordinance does not unconstitutionally impair contracts. As the court's "Interstate Commerce" discussion will indicate, *infra,* the enactment is an appropriate exercise of the protective power of the municipality. Therefore, "it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443-44, 54 S. Ct. 231, 242 (1934).

The Ordinance is not a bill of attainder. As the court's "Vagueness and Overbreadth" discussion indicates, *infra,* this Ordinance applies only to describe activities performed with the requisite intent and it leaves to the courts and juries the task of deciding which persons have violated its provisions. *See, e.g.,* Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 815 S. Ct. 1357 (1961).

Finally, the Ordinance has not been pre-empted by the Federal Food Drug & Cosmetic Act, 21 U.S.C. §§ 301, *et seq.* *See* Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J. 1979).

Because the court at trial overruled the defendants' motion to dismiss for lack of subject matter jurisdiction, *see* Steffel v. Thompson, 415 U.S. 452, 95 S. Ct. 1209 (1974); Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116 (1965); that decision will not be reconsidered here.

3. Section 18, Title 2, of the National Prohibition Law, 17 U.S.C. § 30 stated:

> It shall be unlawful to advertise, manufacture, sell or possess for sale any vessel, contrivance, machine, compound, tablet * * * designed or intended for use in the unlawful manufacture of intoxicating liquor.

In *United States v. Brunnet, et al.,* 53 F.2d 219 (W.D. Mo. 1931) the court assessed the Prohibition Act to determine whose

intent was to be considered *when applying it to sellers.* The court held:

> While the words "designed" and "intended" by which the third element of the offense is stated are simple words, some ambiguity as to their significance arises from their position in the section. It is unlawful to sell "any * * * preparation, compound * * * substance * * * designed or intended for use in the unlawful manufacture," etc. From this arrangement it might be thought that the words "designed" and "intended" described the preparation, compound, and substance prohibited to be sold and referred to some inherent quality therein. Again, it might be thought that they referred to the design and intention of the purchaser. The third possible interpretation is that they refer to the vendor's design or intention.
>
> My view is that the words "designed" and "intended" must be construed to include a design and intention on the vendor's part that the preparation, compound, and substance sold by him will be used in the unlawful manufacture of intoxicating liquor. Such a construction is the one most favorable to one accused. It has never been the policy of the law to make an act innocent in itself criminal if the actor had no wrongful purpose or intent. It is scarcely to be thought that Congress proposed to make the mere sale of a preparation, compound, or substance a crime unless the seller had also an intention and design that what was sold by him should be used in the commission of a crime. Certainly Congress did not intend that he should be guilty of an offense because the manufacturer, if he were other than the vendor, designed the preparation, compound, and substance for an ultimate unlawful use, or because the purchaser so intended to employ it.
>
> Such of the decided cases as have construed the words "designed" and "intended," as they are used in section 30, have construed them as referring to the design and intent of the vendor.

Id. at 230.

The court in *Brunett* outlined three different ways by which the act could be interpreted depending upon the meaning given the words "intended for use." Those three interpretations of intent are the same as the three of the four categories of drug paraphernalia that the plaintiff derives from section 620.01 of the Ordinance:

(1) All items which are *actually used* by the purchaser or some other possessor for drug-related activities;

(2) All items which a purchaser *intends to use* in drug-related activities;

(3) All items which are *designed for use* in drug-related activities; and

(4) All items which are listed in Section 620.01(dd)(1)(L).

Applying the intent of the seller, the *Burnett* court determined that the alternative legal uses of the articles used to produce illegal liquor precluded defining these articles as per se illegal. It further found that a prosecution of a seller under the Act could not be based on the criminal intent of the purchaser, as such a result would violate the clear meaning of the Act. The court finds that reasoning applicable to the Parma Ordinance.

4. The problem of imputing intent to violate the law from the mere offer for sale of certain articles was discussed by the court in *Jones v. United States,* 11 F.2d 98 (4th Cir. 1926). The defendants in that case urged the court to find that the intent of the manufacturer of an article determined the intent for which the article was to be used. In doing so they argued that certain articles be considered illegal based upon the manufacturer's intent, and argued that they could not be held liable for selling those articles, regardless of their intent in making the sale, if the article had not been manufactured with the requisite mens rea. The court held:

> From its language they argue that the article, whatever it is, must be something which was itself made with intent that it should be used in the manufacture of beverage alcohol, and they say that the alcohol which they bought and sold was alcohol which, so far from being designed for use for beverage purposes, had been made unfit for such use by the employment of a formula approved by the government itself. The argument is ingenious, but scarcely convincing.
>
> In our view, the defendants are no less guilty because the alcohol, before it came into their possession, had not been prepared with the intent that it should be used for the manufacture of an intoxicating beverage. They violated the statute, if they intended, when they conspired to offer it for sale and sold it, that it should be used in the manufacture of beverage alcohol, to be sold as such.

Id. at 99.

Other courts have held that the intent of the manufacturer is not to be applied to a seller in determining culpability for the sale of objects. In *Isreal v. United States,* 63 F.2d 345 (3d Cir. 1933) the seller of copper boilers which had been forfeited under the statute argued they should be returned because the boilers had recognized alternative legal uses, and because there was a lack of evidence upon which the court could find the boilers were designed for manufacturing liquor, an unlawful use. Considering the question of seizure of property which has alternative legal and illegal uses the court held:

> The first question is ruled by Danovitz v. United States, 281 U.S. 389, 50 S. Ct. 344, 74 L. Ed. 923, affirming Feitler v. United States (C.C.A.) 34 F(2d) 30, in which it was held that mere possession of property capable of unlawful use, indeed, possession of property "designed" for the manufacture of liquor is not enough to meet the offense defined by section 25, title 2 of the act (27 USCA § 39), but as an

> inseparable part of the forbidden thing the property should also be "intended" "by the seller" "for use in violating" the Act. Weinstein v. United States (C.C.A.) 293 F. 388.

Likewise, the manufacturer of an article was held not culpable under the Prohibition Act when he did not intend the article he manufactured to be used for illegal production of alcohol. The Second Circuit commented on the intent element in *Nosowitz, et al. v. United States,* 282 F. 574 (2d Cir. 1922). The court held that the mere manufacture and sale of an article which could be used for an illegal purpose would not inculpate the manufacturer/seller of the article unless it was intended by him that the article be put to that illegal use. The court held:

> It has always been the law (unless otherwise prescribed be statute) that to convict one of crime requires the proof of an intention to commit a crime. This statute requires that it be shown that the still is "intended for use in the unlawful manufacture of intoxicating liquors." There is no presumption created by the statute which presumes the possession of a vessel that might be used as a still or part of a still to be unlawful. The act of manufacturing must have coupled with it a specific intent to do the wrong denounced in the statute before the defendants may be said to be guilty. Such intent must be proved as an independent fact, or at least circumstances established from which it would be proper to permit a jury to find such intent. There was no proof that the plaintiffs in error intended to manufacture the stills to be used for the unlawful manufacture of liquor.

Id. at 578.

5. Although many if not all of the items described in the Ordinance, as well as those introduced as evidence, have numerous legitimate uses, it is possible that an item which has an innocent use may be proved to have been designed for use with illegal drugs. As District Judge Boyle noted in her analysis of the evidence presented in *Tobacco Road v. City of Novi,* ..... F. Supp. ..... (E.D. Mich.; Slip Op. C79-71000, 6/21/79):

> Defendant also presented two tobacconists who testified that "paraphernalia" was the trade name for accessories intended to be sold for use with controlled substances. Reviewing the Nalpac catalogues, with which each witness was familiar, both identified many pipes which they described as unsuitable for tobacco use and designed for use with controlled substances. These opinions were based on the size of the bowl, the material of the pipe; and the absence of a stem, among other factors. Each witness testified that small-bowl pipes produce a short smoking period while tobacco smokers customarily seek long-smoking pipes and that non-porous materials, such as metal, glass, and acrylic, were unsuitable for tobacco smoking since they condensed rather than absorbed the moisture generated by lengthy pipe smoking. Each witnesses [sic] further testified that certain items in the catalogue such as razor blades and a "coke" mirror had absolutely no use in the tobacco industry.

Defendant's evidence, on the other hand, established that there are items clearly identifiable as being primarily adapted or designed for the use of controlled substances. Indeed, it is inferable that such items are clearly identified by both manufacturers and by retailers for the commercial purpose of marketing the items to be used with controlled substances.

This court does not share the concern that the Indiana District Court expressed in *NORML v. Sendak, supra* at 12, that the phrase "designed for use" is not of sufficient clarity to meet the mandate of due process. An item is designed for use with illegal drugs within the meaning of this Ordinance if the defendant intentionally - that is voluntarily and not because of mistake or other innocent reason - designed or adapted it for use with drugs, regardless of any innocent alternative uses.

6. Specifically, the plaintiff suggests that the thirteen items listed in subsection 610.01(dd)(1)(L) are drug paraphernalia *per se*. This subsection provides:

> Drug Paraphernalia . . . includes, but is not limited to:
>
> (L) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:
>
> (i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured meal bowls;
>
> (ii) Water pipes;
>
> (iii) Carburetion tubes and devices;
>
> (iv) Smoking and carburetion masks;
>
> (v) Roach clips: meaning objects used to hold burning materials, such as a marihuana cigarette, that has become too small or too short to be held in the hand;
>
> (vi) Miniature cocaine spoons, and cocaine vials;
>
> (vii) Chamber pipes;
>
> (viii) Carburetor pipes;
>
> (ix) Electric pipes;
>
> (x) Air-driven pipes;
>
> (xi) Chillums;
>
> (xii) Bongs;
>
> (xiii) Ice pipes or chillers;

The court finds that subsection (L) does not purport to define the listed items as drug paraphernalia *per se*. Because the general definition of drug paraphernalia includes the phrase "used, intended for use, or designed for use," which incorporate the criminal defendant's intent into the definition, and because the phrase "such as" immediately precedes the list, the court finds that the listed items are cited only as examples of items which can be drug paraphernalia if the requisite intent is proved.

The plaintiff's expert, tobacconist Mr. Herman Bessai, testified that pipes of all description and styles can and are used with tobacco, non-hallucinogenic herb mixtures, as well as marijuana. For example, the presence of a screen does not dictate that the pipe is used for smoking marijuana, but rather indicates the smoking preference of a particular smoker. Likewise, pipes with cambers, as well as pipes which cod the smoked substance either with ice, or air, can be used with tobacco, non-hallucinogenic herbs, or marijuana. Testimony, offered in conjunction with the definition of roach clips, § 620.01(dd)(1)(L)(v) indicates that objects as diverse and common as paper clip and alligator clips can be used as roach clips. It is clear, therefore, that the items listed in subpart (L) are generic examples of objects which are commonly used with controlled substances. The mere possession or offer for sale of pipes, alligator clips, miniature spoons, salt cellers, or paper clips does not raise the presumption that the person in possession or selling the objects intends that object to be used with controlled substances or that he so used or designed it. Therefore, the items in subparts (A)-(L) are drug paraphernalia within the meaning of the Ordinance if the requisite intent is proved beyond a reasonable doubt.

Among the items listed are "chillums" and "bongs." The court finds that none of these labels is unconstitutionally vague. They are becoming accepted terms of those who use, intend for use, or design paraphernalia, within the meaning of this Ordinance, with illegal drugs.

7. Section 620.04(g), which provides:

> If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

The court finds that the sections it holds unconstitutional herein, § 620.01(dd)(2), and the "reasonably should have known" standard of knowledge in §§ 620.04(b) and (c), *infra*, are severed from the Ordinance by operation of section 620.04(g). The rest of the enactment is constitutionally valid and shall stand.

"A statute bad in part is not necessarily void in its entirety." Dorchy v. Kansas, 264 U.S. 286, 290, 44 S. Ct. 324 (1924). When two provisions of a statute are distinct, and one part may stand separate from the other, the unconstitutional portion of the statute may be severed, and the constitutional part allowed to stand. Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559 (1952); U.S. v. Jackson, 390 U.S. 570, 88 S. Ct. 1209 (1968).

To determine that the statute shall be allowed to stand, the court must find, that standing alone, legal effect can be given to the parts which are constitutional, and that the legislature intended that staute to be severable. *Dorchy, supra* at 290. As the Court held in *Champlin Refining Corporation, supra*, "Unless it is evident that the legislature would not have enacted those

provisions which are within its power, independently of that which is not, the valid part of what is left is fully operative as a law." *Id.* at 234.

The court finds that the sections of the Parma Ordinance which this court has held to be unconstitutional can be severed from the Ordinance without abrogating any legal effect of the remaining sections. Furthermore, it is clear from section 620.04 (g) that this was the intent of the Parma City Council.

8. The defendant's intentional use of an item with illegal drugs designates that item as drug paraphernalia and consumates a violation of section 620.04(a). Because the elements of the use offense are the same as a portion of the definition of drug paraphernalia, proof that an item is drug paraphernalia under the intentional use portion of the definition is proof of the offense of using drug paraphernalia with illegal drugs. Thus, only the "used" portion of the definition is, as a practical matter, applicable to this offense. Accordingly, the other two intent elements of the general definition of drug paraphernalia, "intent for use" and "design for use," are not elements of this offense.

9. Again, the elements of this offense are the same as the applicable elements defining drug paraphernalia. Therefore, proof that the item possessed by the defendant is drug paraphernalia (defined as an article "intended for use" with drugs) is proof of the offense of possessing drug paraphernalia with intent to use it with illegal narcotics. Thus, only the "intended for use" portion of the general definition is, as a practical matter, applicable to this offense and the other two intent elements," "used" and "designed for use," are not elements of this offense.

10. "Knowingly" and "willfully" are different concepts of mens rea. In "knowingly" the essential element is one of knowledge; in "willfully" there is the additional requirement of acting with deliberation. *United States v. Mekjian,* 505 F.2d 1320 (5th Cir. 1974). As a general rule an act is done willfully if it is done voluntarily and intentionally, and with the specific intent to do something the law forbids. Devitt & Blackmar, *supra* § 14.06. To establish specific intent the prosecution must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

"Willfully" speaks of bad purpose to disobey or disregard the law, and generally connotes a higher degree of specific intent than does "knowingly," which is the intentional doing of an act which the law forbids. *United States v. Sirhan,* 504 F.2d 818 (9th Cir. 1974). Accordingly, a statute or ordinance which requires that an offense be done "knowingly" does not generally entitle the defendant to an additional instruction that the offense be done "willfully." *United States v. Sirhan, supra.*

11. In the Model Penal Code the element of knowledge of a particular fact is also defined as the defendant's awareness of a high probability that of its existence. United States v. Corral-Martinez, 592 F.2d 263 (5th Cir. 1979); see also United States v. Morales, 577 F.2d 769 (2d Cir. 1978).

12. That *knowledge* of the use to which an object *will* be put may be difficult for the government to prove beyond a reasonable doubt, does not render the Ordinance vague. In *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S. Ct. 329 (1952) the Supreme Court upheld a statute which made drivers of vehicles transporting any explosive guilty for knowingly driving on congested thoroughfares, through tunnels, and in dangerous crossings. 18 U.S.C. § 835. The plaintiffs attacked the statute as vague and the Court held:

> The statute punishes only those who knowingly violate the Regulation. This requisite of presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be invalid. That is evident from a consideration of the effect of the requirement in this case. To sustain a conviction, the Government not only must prove that petitioner could have taken another route which was both commercially practicable and appreciably safer (in its avoidance of crowded thoroughfares, etc.) than the one it did follow. It must also be shown that petitioner knew that there was such a practicable, safer route and yet deliberately took the more dangerous route through the tunnel, or that petitioner willfully neglected to exercise its duty under the Regulation to inquire into the availability of such an alternative route.

Id. at 342.

13. As the court noted in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 586 (D.D.C. 1971) (citations omitted):

> [C]ongress could rationally distinguish radio and television from other media on the basis that the public owns the airwaves and that licenses [sic] must operate broadcast facilities in the public interest under the supervision of a federal regulatory agency.

For this reason, regulation of the electronic media is left to the Federal Communications Commission, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S. Ct. 1794 (1969). Furthermore, Title 15, U.S.C. § 45 empowers the Federal Trade Commission to prevent unfair and deceptive advertising practices. Parma is, therefore, without jurisdiction to regulate the electronic media.

FINAL JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT IN RECORD REVOLUTION NO. 6, INC. V. CITY OF PARMA, ET AL.

(Filed April 14, 1980)

Case No. C80-38

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RECORD REVOLUTION NO. 6, INC.,
Plaintiff,

v.

CITY OF PARMA, OHIO, *et al.*,
Defendants.

FINAL JUDGMENT ORDER

Pursuant to the Memorandum of Opinion issued today in the above-captioned case, final judgment is entered for the defendants.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT IN ALEXANDER J. LUKA DBA DAYSTAR BOUTIQUE V. CITY OF LAKEWOOD, ET AL.

(Filed May 8, 1980)

Case No. C80-712

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEXANDER J. LUKA dba
DAYSTAR BOUTIQUE,
Plaintiff,

v.

CITY OF LAKEWOOD, OHIO, *et al.*,
Defendants.

MEMORANDUM OF OPINION

On May 6, 1980 the plaintiff, Alexander J. Luka, filed this action under 42 U.S.C. § 1983 challenging the constitutionality of a City of Lakewood ordinance regulating the distribution, advertisement and use of "drug paraphernalia." The plaintiff's verified complaint seeks declaratory as well as temporary and permanent injunctive relief. This court's subject-matter jurisdiction is based upon 28 U.S.C. §§ 1331, 1334(3), 2201 and 2202. For the reasons discussed below the plaintiff's request for injunctive relief is denied and final judgment for the defendants is granted.

I.

Alexander J. Luka operates Daystar Boutique, a retail business located at 17102 Detroit Avenue, Lakewood, Ohio. In his establishment the plaintiff displays, sells and advertises various items including recorded and taped music as well as "miscellaneous . . . novelty items." (Complaint, ¶ 12). The defendants are: the City of Lakewood (a municipal corporation organized under the laws of Ohio), Anthony Singara (the Mayor of Lakewood), William Blackie (the Law Director and Chief Prosecutor of Lakewood), Charles Petro (Chief of the Parma Police Department), as well as Thomas McBride, John Salmon, Edward Graham, John Gallagher, Thomas Brown, William Chinnock and Trudy Wendling (the members of the Lakewood City Council).

On January 21, 1980 the Council of the City of Lakewood enacted Ordinance No. 5-80: "an emergency ordinance enacting new Subsection 513.01(cc) of the General Offenses Code of the Codified Ordinance of the City of Lakewood and amending Section 513.04 of the General Offenses Code of the Codified Ordinance of the City of Lakewood relating to the prohibiting of drug related paraphernalia."[1] This ordinance was identical to one which the Council of the City of Parma, Ohio enacted on January 7, 1980 (Parma Ord. No. 242-79). Both the Lakewood and Parma ordinances are based upon the "Model Drug Paraphernalia Act" (hereinafter MDPA) drafted by the Drug Enforcement Administration of the United States Department of Justice.

On April 14, 1980 this court declared the Parma codification of the MDPA constitutional as it was construed by the court. See *Record Revolution No. 6, Inc. v. City of Parma, Ohio, et al.*, ... F. Supp. .... (N.D. Ohio 1980). On April 21, 1980 Lakewood, which participated as *amicus curiae* in *Record Revolution,* amended its Ordi-

nance No. 5-80 to conform with the court's ruling in *Record Revolution* by deleting two provisions which the court ordered severed from the Parma ordinance. On April 22, 1980 the amendment, No. 29-80,[2] was signed into law by Lakewood's Mayor, defendant Sinagra.

II.

No material factual issues requiring a trial on the merits are presented in this case. See *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). The issues raised are questions of law which are exclusively the responsibility of the court to determine. Cf. *United States v. Garber*, 589 F.2d 843, 849 (5th Cir. 1979). The plaintiff seeks to have the amended Ordinance declared invalid and unconstitutional. His contentions are: (1) that the enactment is inconsistent with the Due Process Clause of the Fourteenth Amendment because it is overbroad (it prohibits commercial speech protected by the First Amendment) and vague; (2) that it is inconsistent with the Equal Protection Clause of the Fourteenth Amendment because it invidiously discriminates against so-called "head shops" and because it is not reasonably related to any legitimate governmental objective; and (3) that it is inconsistent with the Commerce Clause of the Constitution (Article I, Section 8, Clause 3) because it imposes an impermissible burden on interstate commerce. These legal claims are the same as those which the court decided in *Record Revolution*.[3] Therefore, the court holds that the amended Lakewood ordinance, construed in accordance with the essential elements identified by the court in *Record Revolution*, is constitutional.

Accordingly, the plaintiff's request for injunctive relief is denied and judgment is entered for the defendants.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

FOOTNOTES

1. City of Lakewood Ordinance No. 5-80 provides as follows:

"WHEREAS, this Council has become aware of and is concerned over the general proliferation of "head shops" engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council finds that such establishments serve only to entice young people to abuse substances which are known to be harmful and unsafe for human consumption; and

WHEREAS, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare and for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That the General Offenses Code of the Codified Ordinance of the City of Lakewood be supplemented by an acting new Subsection 513.01(cc) of the General Offenses Code of the Codified Ordinance of the City of Lakewood which shall read as follows:

513.01 DEFINITIONS.

. . .

(cc)(1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes or other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers;

(2) In determining whether an object is "Drug paraphernalia," a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

Section 2. That Section 513.04 of the General Offenses Code of the Codified Ordinance of the City of Lakewood . . . shall be and the same is hereby amended to read as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 of the Codified Ordinances.

(e) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(f) If any provision of this section or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(g) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree.

Section 3. That this Ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law."

2. The amending ordinance, No. 29-80, provides in pertinent part as follows:

AN EMERGENCY ORDINANCE amending Subsection (cc) (2) of Section 513.01 of the General Offenses Code, and amending and supplementing Section 513.04 of the General Offenses of the Codified Ordinances of the City of Lakewood relating to the prohibiting of drug related paraphernalia.

WHEREAS, this Council enacted Ordinance No. 5-80 on January 21, 1980 in response to its concern over the general proliferation of head shops engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council authorized the Director of Law to file an Amicus Brief in the case captioned *Record Revolution No. 6 v. City of Parma, et al.*, being case no. C80-38 in the U.S. District Court for the Northern District of Ohio Eastern Division, and

WHEREAS, the Court has rendered a decision concluding that the Parma and Lakewood Ordinances are constitutional as construed in the Court's opinion, and

WHEREAS, the Court has rendered a decision concluding that the Parma and Lakewood Ordinances are constitutional as construed in the Court's opinion, and

WHEREAS, this Council is desirous of amending the Lakewood Ordinance to conform with the Court's opinion, and

WHEREAS, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare and for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That Subsection (cc)(2) of Section 513.01 of the General Offenses Code of the Codified Ordinances . . . be and the same is hereby amended to read as follows:

513.01 (cc)(2) DEFINITIONS.

In determining whether an object is "Drug paraphernalia," a Court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(L) The existence and scope of legitimate uses for the object in the community;

(M) Expert testimony concerning its use.

Section 2. That Section 513.04 of the General Offenses Code of the Codified Ordinances . . . is hereby amended to read as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) Any person 18 years of age or over who violates paragraph (b) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 [sic] of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree."

3. In addition to the primary legal claims outlined above, in his complaint the plaintiff contends that the ordinance is inconsistent with the Fourth Amendment because it encourages search and seizure with less than probable cause, that it violates the Impairment of Contracts Clause of the Constitution (Article I, Section 10), that it violates the Bill of Attainder Clause of the Constitution (Article I, Section 10), and that it violates the Supremacy Clause of the Constitution (Article VI, Section 2). These claims were also decided in *Record Revolution, supra,* n. 2. The court's reasoning is applicable here as well.

FINAL JUDGMENT ORDER IN ALEXANDER J. LUKA DBA DAYSTAR BOUTIQUE V. CITY OF LAKEWOOD, ET AL.

(Filed May 8, 1980)

Case No. C80-712

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEXANDER J. LUKA dba DAYSTAR BOUTIQUE,
Plaintiff,

v.

CITY OF LAKEWOOD, OHIO, et al.,
Defendants.

FINAL JUDGMENT ORDER

IT IS HEREBY ORDERED that pursuant to the Memorandum of Opinion filed in this case today, final judgment is entered for the defendants at plaintiff's costs.

/s/ JOHN M. MANOS
United States District Judge

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 8, 1980)

No. 80-3308

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECORD REVOLUTION NO. 6, Inc.,
Plaintiff-Appellant,

v.

THE CITY OF PARMA, *et al.*,
Defendants-Appellees.

Before: EDWARDS, *Chief Judge,* MARTIN and JONES, *Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, and the case is remanded for issuance of a permanent injunction prohibiting the enforcement of the drug paraphernalia ordinances in the cities of Parma, Lakewood and North Olmstead.

It is further ordered that Plaintiff-Appellant recovers from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.
/s/ JOHN P. HEHMAN
Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed February 4, 1981)

Case Nos. 80-3308, 80-3352

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RECORD REVOLUTION NO. 6, INC.,
Plaintiff-Appellant,

vs.

CITY OF PARMA, OHIO, *et al.*,
Defendants-Appellees.
(80-3308)

ALEXANDER J. LUKA d/b/a Daystar Boutique,
Plaintiff-Appellant,

vs.

CITY OF LAKEWOOD, OHIO, *et al.*,
Defendants-Appellees.
(80-3352)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The City of Parma, Ohio, the Council for the City of Parma, Ohio, John Petruska, Andrew Boyko, Kenneth G. Kuczma, Victor J. Labutta, Frank J. Houdek, Jack P. Krise, Jr., Joseph A. Molodec, Evelyn M. Kopchak, Gerald M. Boldt, Edward Lonjak, Doris P. Krawczyk, William R. Obuch, Francis Szabo, The

City of Lakewood, Ohio, the Council for the City of Lakewood, Ohio, Anthony C. Sinagra, William E. Blackie, Thomas O. McBride, John G. Salmon, Edward M. Graham, John P. Gallagher, Thomas C. Brown, William F. Chinnock, Trudy Wendling, and Charles Petro, all appellees in the above-styled causes which were previously consolidated by this Court, hereby appeal to the Supreme Court of the United States from the final judgment of this Court, entered on December 8, 1980, reversing the judgment of the district court, and remanding for issuance of a permanent injunction against enforcement of the Cities' drug paraphernalia ordinances.

This appeal is taken pursuant to 28 U.S.C., Section 1254, paragraph (2).

/s/ Andrew Boyko
Law Director, City of Parma
/s/ Stephen P. Bond
Assistant Law Director
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
/s/ William E. Blackie
Law Director, City of Lakewood
Lakewood City Hall
12650 Detroit Avenue
Lakewood, Ohio 44107
(216) 521-7580
Attorneys for all City of Parma and City of Lakewood Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 1981, a copy of the foregoing Notice of Appeal was deposited in a United States mailbox, with first-class postage prepaid, addressed to David C. Weiner, Esq., Hahn, Loeser, Freedheim, Dean & Wellman, 800 National City-East 6th Building, Cleveland, Ohio 44114; to Michael L. Pritzker, Esq., Stroup, Goldstein, Jacobs, Jenkins, Pritzker & Ware, 134 North LaSalle Street, Suite 2100, Chicago, Illinois 60602; and to Michael R. Gareau, Esq., 23821 Lorain Road, North Olmsted, Ohio 44070. In doing so, all parties required to be served have been served.

/s/ ANDREW BOYKO
Law Director, City of Parma
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323

PARMA ORDINANCE NO. 242-79

By: Doris Krawczyk, Gerald Boldt, Frank Houdek, Evelyn Kopchak, Jack Krise, Victor Labutta, Joseph Mooldec, William Obuch

AN ORDINANCE ENACTING NEW SECTIONS 620.01(dd) AND 620.04 TO THE CODIFIED ORDINANCES OF THE CITY OF PARMA, PROHIBITING THE SALE OF DRUG RELATED PARAPHERNALIA, AND DECLARING AN EMERGENCY

WHEREAS, this Council has become aware of and is concerned over the general proliferation of "head shops" engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council finds that such establishments serve only to entice young people to abuse substances which are known to be harmful and unsafe for human consumption; and

WHEREAS, this Council finds that this situation has created a problem of such large proportion as to necessitate further legislation on the subject; Now, Therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PARMA, STATE OF OHIO:

Section 1. That Codified Ordinance 620.01, as enacted by Ordinance 228-75, passed February 2, 1976, is hereby amended by adding the following language:

"620.01 DEFINITIONS.

. . .

(dd) (1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are used,

intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as a mari-

huana cigarette, that has become too small or too short to be held in the hand;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air-driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers;

2. In determining whether an object is "Drug paraphernalia," a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the

object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

. . ."

Section 2. That there is hereby enacted a new section 620.04 of the Codified Ordinances of the City of Parma which shall read as follows:

"620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIS.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) Any person 18 years of age or over who violates paragraph (b) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with

Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree."

Section 3. That Section 620.04 of the Codified Ordinances, as enacted by Ordinance 228-75, passed February 2, 1976, be, and hereby it is, repealed.

Section 4. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and welfare of the City of Parma, and for the further reason that sale and use of drug paraphernalia is a presently-existing and serious danger to youths which requires immediate regulation, and this Ordinance shall become immediately effective upon receiving the affirmative vote of two-thirds of

all members elected to Council and approval of the Mayor, otherwise from and after the earliest period allowed by law.

PASSED: January 7, 1980

/s/ Kenneth G. Kuczma
PRESIDENT OF COUNCIL

ATTEST:

/s/ Bernard J. Survoy
CLERK OF COUNCIL

APPROVED: January 9, 1980

/s/ John Petruska
MAYOR, CITY OF PARMA, OHIO

FILED WITH THE MAYOR: January 9, 1980

I, Bernard J. Survoy, Clerk of Council, City of Parma, County of Cuyahoga and State of Ohio, hereby certify this to be a true correct copy of Ordinance No. 242-79, passed by Parma City Council on the 7th day of January 1980.

/s/ Bernard J. Survoy
Bernard J. Survoy, Clerk of Council

PARMA ORDINANCE NO. 103-80

By: Doris Krawczyk

AN ORDINANCE AMENDING A PORTION OF SECTION 1 AND SECTION 2 OF ORDINANCE NO. 242-79, MORE SPECIFICALLY SECTION 620.01(dd) 2.(K) AND SECTION 620.04(b) RELATIVE TO DRUG PARAPHERNALIA

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PARMA, STATE OF OHIO

Section 1. That a portion of Section 1 of Ordinance No. 242-79, passed January 7, 1980, more specifically Section 620.01(dd) 2.(K), which presently reads as follows:

"620.01 DEFINITIONS

(dd) . . .

2. . . .

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

. . . "

is hereby repealed.

Section 2. That a portion of Section 2 of Ordinance No. 242-79, passed January 7, 1980, more specifically Section 620.04(b), which presently reads as follows:

"620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

. . .

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

. . . "

is hereby amended to read as follows:

"620.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

. . .

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

. . . "

Section 3. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public health, safety and welfare of the

City of Parma, and for the further reason that it is immediately necessary to bring our ordinance in compliance with Federal constitutional standards as enunciated by the Federal District Court, and this Ordinance shall become effective immediately upon receiving the affirmative vote of two-thirds of all members elected to Council and approval of the Mayor, otherwise from and after the earliest period allowed by law.

PASSED: May 5, 1980

/s/ Kenneth G. Kuczma
PRESIDENT OF COUNCIL

ATTEST:

/s/ Bernard J. Survoy
CLERK OF COUNCIL

APPROVED: May 7, 1980

/s/ John Petruska
MAYOR, CITY OF PARMA, OHIO

FILED WITH THE MAYOR: May 7, 1980

I, Bernard J. Survoy, Clerk of Council, City of Parma, County of Cuyahoga and State of Ohio, hereby certify this to be a true and correct copy of Ordinance No. 103-80, passed by Parma City Council on the 5 day of May, 1980.

/s/ Bernard J. Survoy
Bernard J. Survoy,
Clerk of Council

LAKEWOOD ORDINANCE NO. 5-80

BY: Graham, McBride, Salmon, Wendling, Brown, Chinnock, Gallagher

AN EMERGENCY ORDINANCE enacting new Subsection 513.01 (cc) of the General Offenses Code of the Codified Ordinance of the City of Lakewood and amending Section 513.04 of the General Offenses Code of the Codified Ordinance of the City of Lakewood relating to the prohibiting of drug related paraphernalia.

WHEREAS, this Council has become aware of and is concerned over the general proliferation of "head shops" engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council finds that such establishments serve only to entice young people to abuse substances which are known to be harmful and unsafe for human consumption; and

WHEREAS, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare and for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That the General Offenses Code of the Codified Ordinance of the City of Lakewood be supplemented by an acting new Subsection 513.01 (cc) of the General Offenses Code of the Codified Ordinance of the City of Lakewood which shall read as follows:

513.01 DEFINITIONS.

(cc) (1) "Drug Paraphernalia" means all equipment, products and materials of any kind which are used,

intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled-substance in violation of this Chapter. It includes, but is not limited to:

(A) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(B) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(C) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(D) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(E) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(F) Diluents and adulterants such asquinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(G) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

(H) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(I) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(J) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(K) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in paranterally injecting controlled substances into the human body;

(L) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(i) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips: meaning objects used to hold burning material, such as a mari-

juana cigarette, that has become too small or too short to be held in the hand;

(vi) Miniature cocaine spoons, and cocaine vials;

(vii) Chamber pipes;

(viii) Carburetor pipes;

(ix) Electric pipes;

(x) Air-driven pipes;

(xi) Chillums;

(xii) Bongs;

(xiii) Ice pipes or chillers.

(2) In determining whether an object is "Drug paraphernalia," a court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of

the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

Section 2. That Section 513.04 of the General Offenses Code of the Codified Ordinance of the City of Lakewood now reading as follows:

513.04 POSSESSING DRUG ABUSE INSTRUMENTS.

(a) No person shall knowingly make, obtain, possess or use any instrument, article or thing whose customary and primary purpose is for the administration or use of a dangerous drug, other than marijuana, when the instrument involved in a hypodermic or syringe, whether or not of crude of extemporized manufacture or assembly, and the instrument, article or thing involved has been used by the offender to unlawfully administer or use a dangerous drug, other than marijuana, or to prepare a dangerous drug, other than marijuana, for unlawful administration or use.

(b) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741.

(c) Whoever violates this section is guilty of possessing drug abuse instruments, a misdemeanor of the second degree. If the offender has previously been convicted of a drug abuse offense, violation of this section is a misdemeanor of the first degree.

shall be and the same is hereby amended to read as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest,

inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 513.04 of the General Offenses Code of the Codified Ordinances.

(e) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(f) If any provision of this section or the application thereof to any person or circumstance is held

invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(g) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree.

Section 3. That this Ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

Adopted: January 21, 1980 /s/ Thomas O. McBride
President

/s/ Grace Reynolds
Clerk

Approved: January 22, 1980 /s/ Anthony C. Sinagra
Mayor

LAKEWOOD ORDINANCE NO. 29-80

BY: Gallagher, Graham, McBride, Salmon, Wendling, Brown, Chinnock

AN EMERGENCY ORDINANCE amending Subsection (cc) (2) of Section 513.01 of the General Offenses Code, and amending and supplementing Section 513.04 of the General Offenses of the Codified Ordinances of the City of Lakewood relating to the prohibiting of drug related paraphernalia.

WHEREAS, this Council enacted Ordinance No. 5-80 on January 21, 1980 in response to its concern over the general proliferation of head shops engaged in the sale of paraphernalia associated with drug use; and

WHEREAS, this Council authorized the Director of Law to file an Amicus Brief in the case captioned *Record Revolution No. 6 v. City of Parma,* et al., being case no. C80-38 in the U.S. District Court for the Northern District of Ohio Eastern Division, and

WHEREAS, the Court has rendered a decision concluding that the Parma and Lakewood Ordinances are constitutional as construed in the Court's opinion, and

WHEREAS, this Council is desirous of amending the Lakewood Ordinance to conform with the Court's opinion, and

WHEREAS, this Ordinance constitutes an emergency measure providing for the immediate preservation of the public safety and welfare and for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LAKEWOOD, STATE OF OHIO:

Section 1. That Subsection (cc) (2) of Section 513.01 of the General Offenses Code of the Codified Ordinances now reading as follows:

513.01 (cc) (2) DEFINITIONS.

In determining whether an object is "Drug paraphernalia," a Court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(L) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(M) The existence and scope of legitimate uses for the object in the community;

(N) Expert testimony concerning its use.

be and the same is hereby amended to read as follows:

513.01 (cc) (2) DEFINITIONS.

In determining whether an object is "Drug paraphernalia," a Court or other authority should consider, in addition to all other logically relevant factors, the following:

(A) Statements by an owner or by anyone in control of the object concerning its use;

(B) Prior convictions, if any, of an owner, or of anyone in control of the object, under any City, State, or Federal law relating to any controlled substance;

(C) The proximity of the object, in time and space, to a direct violation of this Chapter;

(D) The proximity of the object to controlled substances;

(E) The existence of any residue of controlled substances on the object;

(F) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Chapter; the innocence of an owner or of anyone in control of the object, as to a direct violation of this Chapter shall not prevent a finding that the object is intended for use, or designed for use as "Drug paraphernalia;"

(G) Instructions, oral or written, provided with the object concerning its use;

(H) Descriptive materials accompanying the object which explain or depict its use;

(I) National and local advertising concerning its use;

(J) The manner in which the object is displayed for sale;

(K) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

(L) The existence and scope of legitimate uses for the object in the community;

(M) Expert testimony concerning its use.

Section 2. That Section 513.04 of the General Offenses Code of the Codified Ordinances now reading as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing, or under circumstances where one reasonably should know that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 513.04 of the General Offenses Code of the Codified Ordinances.

(e) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(f) If any provision of this section of the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provisions or application, and to this and the provisions of this section are severable.

(g) Whoever violates any of the provisions of paragraphs (a), (b) or (c) is guilty of a misdemeanor of the second degree. If the offender has previously been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree.

be and the same is hereby amended to read as follows:

513.04 POSSESSION, MANUFACTURE, AND SALE OF DRUG PARAPHERNALIA.

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this Chapter.

(b) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia, knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or other-

wise introduce into the human body a controlled substance in violation of this Chapter.

(c) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(d) Any person 18 years of age or over who violates paragraph (b) by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a special offense.

(e) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct was in accordance with Ohio R.C. Chapters 3719, 4715, 4729, 4731 and 4741. This section shall not be construed to prohibit any possession, manufacture, or use of hypodermics made lawful by Section 620.09 of the Codified Ordinances.

(f) Any drug paraphernalia used in violation of this section shall be seized and forfeited to the Municipality.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(h) Whoever violates any of the provisions of paragraphs (a), (b), or (c) is guilty of a misdemeanor of the second degree. If the offender has previously

been convicted of a violation of paragraphs (a), (b), or (c), any subsequent violation of the same paragraph is a misdemeanor of the first degree. Whoever violates any of the provisions of paragraph (d) is guilty of a misdemeanor of the first degree.

Section 3. That this ordinance is hereby declared to be an emergency measure for the reasons stated in the preamble hereof and provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its adoption and approval by the Mayor; and all other ordinances or parts of ordinances inconsistent herewith shall be and are hereby repealed.

Adopted: April 21, 1980

/s/ Thomas O. McBride
President
/s/ Grace Reynolds
Clerk

Approved: April 22, 1980

/s/ Anthony C. Sinagra
Mayor

Supreme Court
F I L E D
APR 27 1981

No. 80-1507

In the Supreme Court of the United States

October Term, 1980

THE CITY OF PARMA, OHIO, *et al.*, and
THE CITY OF LAKEWOOD, OHIO, *et al.*,
Appellants,

vs.

RECORD REVOLUTION NO. 6, INC. and ALEXANDER J. LUKA d/b/a DAYSTAR BOUTIQUE,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED BY THE APPEAL

1. Whether the fact that the municipal ordinances adopted by the City of Parma and the City of Lakewood (the "Ordinances") are rendered invalid under the Ohio Constitution because they conflict with Section 2925.14 of the Ohio Revised Code merits the dismissal of the appeal.

2. Whether the correct decision of the Court of Appeals for the Sixth Circuit holding that the definition of "drug paraphernalia" in the Ordinances is vague and overbroad and invites discriminatory enforcement in violation of the Due Process Clause of the Constitution merits review by this Court.

3. Whether the correct finding of the Court of Appeals for the Sixth Circuit that the Ordinances improperly create permissive inferences or permissive presumptions merits review by this Court.

4. Whether the correct decision of the Court of Appeals for the Sixth Circuit holding that the prohibition on advertising in the Ordinances impermissibly penalizes speech protected by the First Amendment to the Constitution merits review by this Court.

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No. 80-1507

In the Supreme Court of the United States

October Term, 1980

THE CITY OF PARMA, OHIO, *et al.*, and
THE CITY OF LAKEWOOD, OHIO, *et al.*,
Appellants,

vs.

RECORD REVOLUTION NO. 6, INC. and ALEXANDER J. LUKA d/b/a DAYSTAR BOUTIQUE,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Appellants herein are the cities of Parma, Ohio and Lakewood, Ohio and their respective officials (hereinafter collectively referred to as the "Cities"). Appellees (hereinafter collectively referred to as the "Merchants") operate retail establishments which display, sell and advertise recorded and taped music, magazines, jewelry, T-shirts and a variety of novelty items. The Cities challenge the unanimous decision of the Court of Appeals for the Sixth Circuit ("Sixth Circuit") which declared unconstitutional and enjoined the enforcement of municipal ordinances of the cities

of Parma and Lakewood (the "Ordinances")[1] which were intended to drive the Merchants out of business.[2]

The Ordinances prohibit the possession,[3] sale,[4] manufacture,[5] and advertisement[6] of "drug paraphernalia." "Drug paraphernalia" is defined as any item "used, intended for use, or designed for use" in drug-related activities.[7] Listed in the Ordinances are legislatively designated examples of "drug paraphernalia"[8] and factors which law enforcement officers, judges and juries are instructed to consider in determining whether particular items are illicit "drug paraphernalia."[9]

The Ordinances impose criminal[10] and forfeiture[11] penalties for the possession, sale, manufacture or advertisement

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1. The Sixth Circuit also unanimously held unconstitutional a similar ordinance adopted by the City of North Olmsted, Ohio. The City of North Olmsted has determined not to appeal the decision of the Sixth Circuit.

The Ordinances are included in the Appendix to the Cities' Jurisdictional Statement ("Jurisdictional Statement"), beginning at p. A119.

2. *Record Revolution No. 6, Inc. v. City of Parma*, No. 80-3308, slip op. at 13-14 (6th Cir. Dec. 8, 1980) (hereinafter cited as "Slip Op.").

3. Parma Ordinance §§ 620.04(a) & (b); Lakewood Ordinance §§ 513.04(a) & (b).

4. Parma Ordinance § 620.04(b); Lakewood Ordinance § 513.04(b).

5. Parma Ordinance § 620.04(b); Lakewood Ordinance § 513.04(b).

6. Parma Ordinance § 620.04(c); Lakewood Ordinance § 513.04(c).

7. Parma Ordinance § 620.01(dd)(1); Lakewood Ordinance § 513.01(cc)(1).

8. Parma Ordinance § 620.01(dd)(1)(L); Lakewood Ordinance § 513.01(cc)(1)(L).

9. Parma Ordinance §§ 620.01(dd)(2)(A)-(N); Lakewood Ordinance §§ 513.01(cc)(2)(A)-(M), as amended.

10. Parma Ordinance § 620.04(h); Lakewood Ordinance § 513.04(h), as amended.

11. Parma Ordinance § 620.04(f); Lakewood Ordinance § 513.04(f), as amended.

of so-called "drug paraphernalia." An individual violating the Ordinances for the first time is subject to a jail sentence of up to Ninety (90) days or a fine of up to Seven Hundred Fifty Dollars ($750.00) or both. If a person delivers "drug paraphernalia" to a juvenile, that person is subject to a jail sentence of up to Six (6) months or a fine of up to One Thousand Dollars ($1,000.00) or both.

Following a full evidentiary hearing, the United States District Court for the Northern District of Ohio ("District Court") found central portions of the Ordinances in violation of the Constitution.[12] However, rather than strike down the Ordinances, the District Court substantially rewrote the Ordinances by "adding to, deleting from and defining the statutory language."[13]

The Sixth Circuit unanimously reversed the judgment of the District Court, declared the Ordinances unconstitutional, and remanded for issuance of a permanent injunction. The Sixth Circuit correctly held:

(1) The District Court exceeded the scope of its powers by substantially rewriting the Ordinances;

(2) The Ordinances are vague and overbroad, invite discriminatory enforcement, and improperly create permissive inferences in violation of the Due Process Clause of the Constitution; and

(3) The Ordinances impermissibly penalize speech protected by the First Amendment to the Constitution.

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12. *Record Revolution No. 6, Inc. v. City of Parma, Ohio*, 492 F. Supp. 1157 (N.D. Ohio 1980).

13. Slip Op. at 17.

MOTION TO DISMISS

The Ordinances violate the Ohio Constitution because they conflict with a statute recently enacted[14] by the Ohio General Assembly which prohibits the sale of "drug paraphernalia" to juveniles. Therefore, it is unnecessary for this Court to reach any of the federal questions raised by the appeal and, accordingly, the appeal should be dismissed.

Municipalities in Ohio have the authority to exercise such powers, and to enact and enforce such local legislation, as do not conflict with statutes and laws passed by the state legislature which are of general application throughout the State. This limitation on the powers which a municipality lawfully possesses derives from the Ohio Constitution:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*

Ohio Const., Art. XVIII, § 3 (emphasis supplied).

In determining whether an ordinance is "in conflict with general laws,"[15] the Ohio Supreme Court has held that "the test is whether the [municipal] ordinance permits or licenses that which the [state] statute forbids

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14. Section 2925.14 of the Ohio Revised Code, enacted on December 19, 1980, eleven days after the opinion of the Sixth Circuit was filed, became effective March 23, 1981.

15. Section 2925.14 of the Ohio Revised Code is a "general law" within the meaning of Article XVIII, § 3. *Cf. State ex rel. Arey v. Sherrill,* 142 Ohio St. 574, 53 N.E.2d 501 (1944) (paragraph 2 of the syllabus) ("The words 'general laws,' as used in the phrase 'not in conflict with general laws' in Section 3, Article XVIII of the Constitution, refer to laws enacted by the General Assembly.").

and prohibits, *and vice versa.*" *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923) (paragraph 2 of the syllabus) (emphasis added).

The Ordinances clearly conflict with Section 2925.14 of the Ohio Revised Code (the "State Statute")[16] because they forbid and prohibit conduct which the State Statute specifically permits.

The State Statute makes it a criminal offense for a person to sell or offer to sell "drug paraphernalia" to a juvenile,[17] and provides to a defendant three affirmative defenses.[18] The penalty for a violation of the State Statute is a maximum jail sentence of up to Six (6) months or a fine of up to One Thousand Dollars ($1000.00) or both.[19]

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16. Section 2925.14 of the Ohio Revised Code is set forth in the Appendix.

17. Section 2925.14(B) of the Ohio Revised Code. "Juvenile" is defined as "a person under eighteen years of age." Section 2925.01(O) of the Ohio Revised Code (amended effective March 23, 1981).

18. Section 2925.14(C) of the Ohio Revised Code. The affirmative defenses are:

> (1) The defendant is the parent, guardian, or custodian of the juvenile involved.
>
> (2) The juvenile involved, at the time the paraphernalia for the use of marihuana was sold or offered for sale to him, was accompanied by his parent, guardian, or custodian who, with knowledge that the paraphernalia sold or offered for sale would be used or was intended for use for a purpose set forth in division (A)(1), (2), (3), or (4) of this section, consented to the paraphernalia for the use of marihuana being sold or offered for sale to the juvenile.
>
> (3) The juvenile involved exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or older, and the person to whom the document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under eighteen years of age.

19. *See* Section 2925.14(E) of the Ohio Revised Code.

The Ordinances also proscribe the sale or the offer to sell "drug paraphernalia" to juveniles,[20] providing the same criminal penalties for said activities as provided by the State Statute.[21] However, the Ordinances fail to provide the affirmative defenses to a violation that are provided in the State Statute. Thus, for instance, the Ordinances prohibit the sale of "drug paraphernalia" to a juvenile accompanied by his consenting parent while the State Statute positively permits such conduct by its inclusion of an affirmative defense which provides that such sale is lawful.

For these reasons, the Ordinances are in direct conflict with the State Statute.[22] The Ordinances have been rendered invalid by the subsequent State Statute, and their continued existence violates the Ohio Constitution. Therefore, it is unnecessary for this Court to reach any of the federal issues raised by the Cities and, accordingly, the appeal should be dismissed.

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20. Parma Ordinance §§ 620.04(b) and (d); Lakewood Ordinance §§ 513.04(b) and (d), as amended.

21. Parma Ordinance § 620.04(h); Lakewood Ordinance § 513.04(h), as amended. However, the Ordinances provide forfeiture penalties not provided by the State Statute. *See* Parma Ordinance § 620.04(f); Lakewood Ordinance § 513.04(f), as amended.

22. *See City of Cleveland v. Raffa*, 13 Ohio St. 2d 112, 235 N.E.2d 138, *cert. denied*, 393 U.S. 927 (1968); *Neil House Hotel Co. v. City of Columbus*, 144 Ohio St. 248, 58 N.E.2d 665 (1944); *State ex rel. Cozart v. Carran*, 133 Ohio St. 50, 11 N.E.2d 245 (1937); *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929); *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923).

MOTION TO AFFIRM

Alternatively, the Merchants move to affirm the judgment of the Sixth Circuit on the grounds that the questions presented are so unsubstantial as not to warrant further argument. Any decision by this Court would be premature and would have an extremely limited impact. Moreover, the judgment of the Sixth Circuit is plainly correct.

A. Any Decision by this Court Would Be Premature and Would Have an Extremely Limited Impact.

This appeal does not present to the Court questions concerning the constitutionality of a federal law, with nationwide implications, adopted by the Congress of the United States. Although the "drug paraphernalia" ordinances adopted in Parma and Lakewood are based upon a Model Drug Paraphernalia Act ("Model Act") drafted by the Drug Enforcement Agency of the Department of Justice, the Justice Department apparently determined not to submit the draft of its Model Act to Congress for consideration.[23] While some governmental units have adopted laws based, in whole or in part, on the Model Act, other governmental units that have considered the "drug paraphernalia" issue have determined not to adopt any law or adopted one of a number of formulations substantially differing from the Model Act. This case only raises questions concerning ordinances adopted by two municipalities

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23. If, as suggested by the Cities at page 8 of their Jurisdictional Statement, the sale of "drug paraphernalia" creates a major national problem, it is surprising that the Justice Department did not submit its Model Act to Congress. Moreover, there is nothing in the record to support the Cities' allusion to a multimillion dollar industry which preys upon the nation's youth. Jurisdictional Statement at 8.

in the State of Ohio, for the Ordinances materially differ from the Model Act.[24]

The vast majority of courts presented with the issue of the constitutionality of laws banning the sale and possession of "drug paraphernalia" have declared those laws unconstitutionally vague and overbroad and has enjoined enforcement thereof. *E.g., The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates,* No. 80-1462 (7th Cir. Jan. 14, 1981) (citing the judgment of the Sixth Circuit with approval); *General Stores, Inc. v. City of Albuquerque,* No. 81-0027-M (D.N.M. March 23, 1981); *The Town Tobacconist v. Degnan,* No. C-2198-80 (Super. Ct. Ch. N.J. March 12, 1981); *Gaffey v. Babb,* No. CA-13882 (Ct. App. Or. Feb. 23, 1981); *Weiler v. Carpenter,* No. 80-637-JB (D. N.M. Feb. 11, 1981); *Lazy, J., Ltd. v. The Borough of State College,* No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville,* No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *High Ol' Times, Inc. v. Busbee,* No. 78-628A (N.D. Ga. Dec. 1, 1980); *Record Head Corp. v. Sachen,* No. 80-C-639 (E.D. Wis. Sept. 30, 1980); *Magnani v. City of Ames,* No. 80-229-A (S.D. Iowa July 21, 1980); *Hejira Corp. v. J.D. MacFarlane,* No. 80-F-824 (D. Colo. Sept. 15, 1980); *Music Stop, Inc. v. City of Ferndale,* 488 F. Supp. 390 (E.D. Mich. 1980); *Indiana Chapter, NORML, Inc. v. Sendak,* No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) (3-judge district court), *vacated as moot at the time of appeal,* No. 80-1305 (7th Cir. July 22, 1980); *Knoedler v. Roxbury Township,* No. 80-228 (D.N.J. Jan. 31, 1980); *Weingart v. Town of Oyster Bay,* No. 79-C-2932 (E.D.N.Y. Dec. 17, 1979); *Record Museum v. Lawrence Township,* 481 F. Supp 768 (D.N.J. 1979); *Bambu Sales, Inc. v. Gibson,* 474 F. Supp. 1297 (D.

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24. The most important differences are that the "reasonably should have known" criterion, found throughout the Model Act, has been eliminated in almost all provisions of the Ordinances, and the factor referring to a "legitimate supplier" in the Model Act is not in the Ordinances.

N.J. 1979); *Riddle v. Clack,* No. 3-77-0525-D (N.D. Tex. Aug. 25, 1977).

Significantly, contrary to the statement of the Cities at page 9 of their Jurisdictional Statement, since the Sixth Circuit rendered its well-reasoned judgment, *every* court presented with a challenge to a "drug paraphernalia" law based upon the Model Act has followed the lead set by the Sixth Circuit in striking down the law. *E.g., General Stores, Inc. v. City of Albuquerque,* No. 81-0027-M (D.N.M. March 23, 1981); *Weiler v. Carpenter,* No. 80-637-JB (D. N.M. Feb. 11, 1981); *Lazy, J., Ltd., v. The Borough of State College,* No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville,* No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *Gaffey v. Babb,* No. CA-13882 (Ct. App. Or. Feb. 23, 1981); *The Town Tobacconist v. Degnan,* No. C-2198-80 (Super. Ct. Ch. N.J. March 12, 1981).

The Court of Appeals for the Sixth Circuit is the only federal appellate court to have decided cases presenting the issue of the constitutionality of any "drug paraphernalia" laws based upon the Model Act. Moreover, only a handful of federal district courts have dealt with that same issue. It is premature for this Court to consider the instant appeal, particularly in light of the unanimous determination of courts following the judgment of the Sixth Circuit that ordinances and statutes based upon the Model Act violate the First and Fourteenth Amendments to the Constitution.

B. The Sixth Circuit Correctly Held that the District Court Exceeded the Scope of its Powers by Substantially Rewriting the Ordinances.

The Sixth Circuit correctly held that the District Court usurped the legislative function by substantially revising the Ordinances in an attempt to remedy the constitutional defects it found in the Ordinances:

> The district court construed the drug paraphernalia ordinances by adding to, deleting from and defining the statutory language. A federal court, however, has very limited powers in construing state statutes or municipal ordinances. For the federal court's interpretation of state or municipal legislation is "not binding on the state courts and may be discredited at any time—thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless." *Moore v. Sims,* 442 U.S. at 428. *See State v. Young,* 62 Ohio St. 2d at 375 n.2, 406 N.E.2d at 503 (After citing to a federal court decision on the same state statute, the Ohio Supreme Court declared: This federal case is not binding upon this court, and we note the decision rendered in that case only as supporting authority).

Slip Op. at 17-18. *See also Hynes v. Borough of Oradell,* 425 U.S. 610, 622 (1976); *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971). Based upon these principles, the Sixth Circuit properly held that the District Court exceeded the scope of its powers. "The district court should have declared the ordinances unconstitutionally vague and overbroad on the basis of the defects that it found in the ordinances." Slip Op. at 19.

The Cities, relying upon *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), argue that federal courts have the same power authoritatively to construe state statutes and municipal ordinances as to construe federal legislation.[25] Jurisdictional Statement at 13-14. However, the Cities'

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25. Each of the other cases relied upon by the Cities, Jurisdictional Brief at 13, involve federal courts interpreting federal legislation, and are therefore inapposite. *E.g., Califano v. Yamasaki,* 442 U.S. 682 (1979); *United States v. National Dairy Products Corp.,* 372 U.S. 29, 32 (1963); *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379 (1933); *United States v. Kiffer,* 477 F.2d 349 (2d Cir.), *cert. denied,* 414 U.S. 831 (1973).

lengthy quote from *Erznoznik*, 422 U.S. at 216, at page 14 of their Jurisdictional Brief, is misleading. The Cities replaced several crucial words with an ellipsis at the end of the quoted portion as follows:

> [W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction *by the state courts* . . . .

The underlined words were omitted by the Cities from the quotation, thereby changing the entire meaning of the Court's analysis. *Erznoznik* does not support the proposition that federal courts have the same power to construe federal and state laws.[26] For the reasons discussed by the Sixth Circuit, federal courts have very limited powers to construe state statutes or local ordinances.

The Sixth Circuit properly refused to condone the rewriting of municipal ordinances by a federal court.[27] For

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26. The Cities also rely on *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), for the proposition that a federal court should "extrapolate" the meaning of a state or municipal law so as to uphold its constitutionality. Jurisdictional Brief at 14. However, the Court in *Grayned* distinguished between "extrapolation" and "construction":

> "Extrapolation," of course, is a delicate task, for it is not within our power to *construe* and *narrow* state laws.

408 U.S. at 110 (emphasis added). The Court in *Grayned* did not add, delete or narrow any statutory terms, as opposed to the actions taken by the District Court herein. Slip Op. at 18 n.12.

27. Moreover, the Sixth Circuit correctly stated that the state courts could not construe the Ordinances so as to eliminate the problems of vagueness and overbreadth. Slip Op. at 16. That is a major reason why both the Sixth Circuit and the District

(Continued on following page)

the reasons discussed above, the Sixth Circuit correctly held that the District Court exceeded the scope of its powers by substantially rewriting the Ordinances.

C. The Definition of "Drug Paraphernalia" Clearly Is Vague and Overbroad and Invites Discriminatory Enforcement in Violation of the Due Process Clause of the Constitution.

The Sixth Circuit held that the definition of "drug paraphernalia" in the Ordinances is vague and overbroad in violation of the Fourteenth Amendment to the Constitution. That determination, based upon the application of principles enunciated by this Court, is clearly correct.

The Sixth Circuit set forth the standards of vagueness and overbreadth which guided its decision:

> The due process clause of the Fourteenth Amendment includes the doctrines of void-for-vagueness and overbreadth. These two doctrines have distinct meanings and purposes, though a statute which is vague is also often overbroad. The void-for-vagueness doctrine commands any statute to give persons of common intelligence fair notice of the persons covered and the conduct proscribed. *Colautti v. Franklin,* 439 U.S. 379, 390-91 (1979). Fundamental fairness, as well as a proper regard for preventing the deterrence of constitutionally protected conduct, requires that per-

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Footnote continued—

Court properly held that abstention is inappropriate in this case. Slip Op. at 15-17. Among the courts which have been presented with constitutional challenges to laws regulating "drug paraphernalia," only one abstained; its decision to abstain was reversed by the Court of Appeals for the Fifth Circuit. *High Ol' Times, Inc. v. Busbee,* 621 F.2d 135 (5th Cir. 1980). The Cities do not contest on appeal the holding of the District Court and the Sixth Circuit on the abstention issue.

sons not be compelled to guess at their own peril the meaning and application of a statute. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939). Ascertainable standards of guilt are imperative in order to protect against arbitrary, erratic, and discriminatory arrests, prosecutions and convictions. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972); *Winters v. New York,* 333 U.S. 507, 515 (1948). Unless the statute itself prescribes sufficiently precise standards, basic policy decisions are impermissibly delegated to the personal predilections of the police, prosecutors and juries. *Smith v. Goguen,* 415 U.S. at 575 (1974); *Grayned v. City of Rockford,* 408 U.S. at 108. "Legislators may not so abdicate their responsibilities for setting the standards of the criminal law." 415 U.S. at 575. Finally, a greater degree of precision is required when the statute defines criminal offenses or impinges on activities protected by the First Amendment. *Hynes v. Mayor and Council of the Borough of Oradell,* 425 U.S. at 620; *Winters v. New York,* 333 U.S. at 515; *Diebold, Inc. v. Marshall,* 585 F.2d 1327, 1336 (6th Cir. 1978). *But see Rose v. Locke,* 423 U.S. 48, 50 (1975) (per curiam).

The overbreadth doctrine prohibits a statute from making innocent or constitutionally protected conduct criminal. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971). The statutory language may be very clear, yet "sweep unnecessarily broadly to invade the area of protected freedoms." *Sawyer v. Sandstrom,* 615 F.2d 311 (5th Cir. 1980). The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.

Slip Op. at 19-20. The Cities do not challenge these standards.

The Ordinances define "drug paraphernalia," in pertinent part, as all items "designed for use" in drug-related activities. The Sixth Circuit correctly applied the foregoing due process standards in determining that the definition of "drug paraphernalia" is vague and overbroad.

The crucial problem in defining "drug paraphernalia" in terms of the "design" of items is the lack of any design characteristics that distinguish items with lawful uses and purposes from items with unlawful uses. Slip Op. at 26-27. The unrebutted evidence introduced in the District Court established that practically any everyday item can be and has been used in drug-related activities. "The type of object that can become, or be used as, drug paraphernalia is limited only by the imagination of the user." Slip Op. at 26.

The court in *Indiana Chapter, NORML, Inc. v. Sendak*, slip op. at 12-14, in a well-reasoned opinion relied upon by the Sixth Circuit,[28] held that a definition of "drug paraphernalia" relying upon design characteristics is unconstitutionally vague:

> The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand

28. Slip Op. at 24-26.

> mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the statute] what is included in the definition. The definition fails to make clear what items are included in the statutory provision and what items are not.

Due to the limitless range of items which may be used or adapted for use with controlled substances and the lack of any unique design characteristics differentiating drug-related devices from innocent items, the Ordinances fail to "give persons of common intelligence fair notice" of the "conduct proscribed," and therefore violate due process.[29] *Accord, The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates,* No. 80-1462 (7th Cir. Jan. 12, 1981); *Weiler v. Carpenter,* No. 80-637-JB, slip op. 11-12 (D.N.M. Feb. 11, 1981); *Lazy, J., Ltd. v. The Borough of State College,* No. 80-1167, slip op. 4-7 (M.D. Pa. Jan. 30, 1981); *Back Door Records v. City of Jacksonville,* No. LR-C-80-314, slip op. 4-5 (E.D. Ark. Jan. 8, 1981); *Gaffey v. Babb,* No. CA-13882, slip op. 20-22 (Ct. App. Or. Feb. 23, 1981).

The District Court erroneously upheld the constitutionality of the phrase "designed for use" on the ground that there are unique, ascertainable design characteristics

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29. The Sixth Circuit recognized that the term "designed" is not limited to items *solely* designed to be "drug paraphernalia:"

> The comments to the Model Act indicate that the ordinances would apply to items which are not solely designed to be drug paraphernalia. App. 1237. Vagueness enters in our case once the ordinances begin to define drug paraphernalia in terms of the primary adaption or dominant purpose of the design. Then the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users. *Geiger v. City of Egan,* 618 F.2d 26 (8th Cir. 1980); *Music Stop, Inc. v. City of Ferndale,* 488 F. Supp. 390 (E.D. Mich. 1980).

Slip Op. at 26.

inherent in "drug paraphernalia." 492 F. Supp. 1157, 1169 n.5. The District Court erred in basing its conclusion on evidence introduced in another case not before it, *Tobacco Road v. City of Novi,* 490 F. Supp. 537 (E.D. Mich. 1980),[30] while disregarding the unrebutted evidence in the record before it. Slip Op. at 26 n.20.

The lack of design characteristics of "drug paraphernalia" is what distinguishes the instant action from cases determined fifty years ago under the National Prohibition Act, relied upon by the Cities at pages 11-12 of their Jurisdictional Statement. The term "designed" under the National Prohibition Act was held to refer to "inherent qualities" of items "peculiarly designed" for the unlawful use proscribed in that Act. *See, e.g., United States v. Brunett,* 53 F.2d 219, 230 (W.D. Mo. 1931).[31]

In view of the lack of any inherent design characteristics differentiating lawful items from unlawful "drug paraphernalia," it is clear that the definition of "drug paraphernalia" fails to provide fair notice of proscribed items and invites discriminatory enforcement of the Ordinances. The testimony of the Cities' narcotics law enforcement experts introduced at trial and recounted by the Sixth Circuit con-

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30. A virtually identical ordinance to that upheld by the court in *Tobacco Road* subsequently was declared unconstitutional by a different judge of the same court in *Music Stop, Inc. v. City of Ferndale,* 488 F. Supp. 390 (E.D. Mich. 1980).

31. The court in *Brunett* stated:

> I think the words refer, not only to the design and intention of the vendor, but as well to the *inherent qualities* of the preparation, compound, and substance sold. The preparation, compound and substance *must* be within itself *peculiarly designed* for the unlawful use referred to in this section. Otherwise we might have criminal cases in which nothing more was sold than a box of matches or a gallon of gasoline. For certainly matches and gasoline are substances, and certainly, also, they not only may be used, but necessarily are used, in the unlawful manufacture of such intoxicating liquors as, for example, distilled spirits.

53 F.2d at 231 (emphasis added).

vincingly demonstrates the danger of arbitrary and discriminatory enforcement of the Ordinances:

> Detectives Bennett and Rutt would arrest any retailer who sold pipes with screens or chamber pipes, despite the ability to use these pipes lawfully. App. 712-13, 717-18, 850-51. Detective Rutt would arrest a retailer operating a "head shop" if it sold alligator clips or cigarette papers, but not a drug store owner selling the same items. App. 853, 864-65. This testimony suggests that the ordinances would be enforced only against "head shops", designated by the local law enforcement officials. No guidelines have been written to prevent such selective discriminatory enforcement. Because the ordinances would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad.

Slip Op. at 27.[32]

For the reasons discussed above, it is clear that the Sixth Circuit correctly applied the standards of due process

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32. The Sixth Circuit suggested that the vagueness and overbreadth of the definition of "drug paraphernalia" may be due to the failure of the legislators in Parma and Lakewood to study or investigate the "drug paraphernalia" industry:

> Parma Mayor Petruska, Councilwoman Krawczyk and Councilman Labutta each testified at deposition to their total lack of familiarity with drug paraphernalia and their inability to define it. App. 928-29, 933, 969, 984, 1130, 1140. Time and again, they stated that the definition of drug paraphernalia was the responsibility of the police. App. 901-02, 930, 985, 1001, 1003. The record shows beyond peradventure the legislators' conscious delegation of basic policymaking decisions to the police, prosecutors, and juries. Due process forbids such delegation of legislative responsibility. *Smith v. Goguen*, 415 U.S. at 575; *Grayned v. City of Rockford*, 408 U.S. at 108.

Slip Op. at 28.

set forth by this Court in determining that the definition of "drug paraphernalia" in the Ordinances is vague and overbroad. "Drug paraphernalia" cannot validly be defined in terms of the unlawful "design" of certain items.

The Ordinances also define "drug paraphernalia" as all items "used" or "intended for use" in drug-related activities. These definitions of "drug paraphernalia" are also vague and overbroad in violation of the aforesaid principles of due process. *E.g., General Stores, Inc. v. City of Albuquerque*, No. 81-0027-M, slip op. at 4-5 (D.N.M. March 23, 1981); *Weiler v. Carpenter*, No. 80-637-JB, slip op. at 8-11 (D.N.M. Feb. 11, 1981); *Gaffey v. Babb*, No. CA-13882, slip op. at 14-17 (Ct. App. Or. Feb. 23, 1981); *The Town Tobacconist v. Degnan*, No. C-2198-80, slip op. at 8 (Super. Ct. Ch. N.J. March 12, 1981).[33]

Defining "drug paraphernalia" as items "used" or "intended for use" in drug-related activities violates due process by failing to give proper notice of illicit items and by permitting innocent persons to be arrested, prosecuted, and convicted on the basis of an act or state of mind of another person.[34] The constitutional defects in these definitions of "drug paraphernalia" are well-stated by the court in *Weiler v. Carpenter*, slip op. at 8-10 (emphasis in original):

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33. The Sixth Circuit upheld the constitutionality of the terms "used" and "intended for use." Slip Op. at 23.

34. The legislative history of the Ordinances clearly reveals that the phrases "used" and "intended for use" refer to the use or intended use by a purchaser or prospective user. Statement of Peter Bensinger, Drug Enforcement Administration, before House Select Committee on Narcotics Abuse and Control, November 1, 1979 at 4-5, App. at 1064-65; Deposition of Victor Labutta, Parma City Councilman, January 22, 1980, App. at 1123-24; Deposition of Doris Krawczyk, sponsor of the Parma Ordinance, January 22, 1980, App. at 994. The legislative history must be accorded "substantial weight" in interpreting the Ordinances. *Federal Energy Administration v. Algonquin, SNG, Inc.*, 426 U.S. 548 (1976).

> [A]n owner, or anyone in control of "drug paraphernalia," can be liable for failing to divine a *purchaser's* intent with regard to an item. Stated another way, the determinative element in defining "drug paraphernalia" is the intent of someone other than the person to be charged with the ordinance violation . . . . Consider the following hypothetical situation. A salesclerk, working in a large grocery store, sells plastic sandwich bags to dozens of customers daily. Plastic sandwich bags fall into the definition of "drug paraphernalia" if they meet the "intended for use" standard. It is probable, even likely, that one or more of those plastic sandwich bags is intended for illicit drug use by the purchaser. The Court cannot fathom how the clerk could determine which purchaser intended the bags for illicit use. . . . Not only must the clerk guess at each and every purchaser's intent; he must also run the risk that his determination of a purchaser's "innocent" intent may be different than a police determination. . . . The *police officer* determines, independent of any guideline, what constitutes a violation of the ordinance. The net cast by the . . . ordinance is "large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Papachristou v. City of Jacksonville, supra,* 405 U.S. at 165. An ordinance that does no more than unconstitutionally increase the arsenal of police simply cannot stand. *Id.*[35]

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35. The court in *The Town Tobacconist,* slip op. at 7-8, also clearly described the constitutional defects in the phrases "used" and "intended for use:"

> Objects are not used or intended for use in an unpopulated vacuum. The use or intention for use envisioned by the statute must be by someone. It is not facially clear

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For these reasons, the terms "used" and "intended for use", as well as "designed for use", are vague and overbroad and invite discriminatory enforcement in violation of the Fourteenth Amendment to the Constitution. Therefore, the definition of "drug paraphernalia" in the Ordinances cannot pass constitutional muster.

D. The Ordinances Create Permissive Inferences in Violation of Due Process Standards.

The Ordinances list items deemed to be "common forms of drug paraphernalia."[36] Slip Op. at 29; Jurisdictional Statement at 7. That listing impermissibly allows law enforcement officers, judges and juries to infer guilt from possession, sale or manufacture of an item listed therein. Said permissive inference violate due process.

A permissive inference:

> allows - but does not require - the trier of fact to infer the elemental fact [*i.e.*, sale or possession of "drug

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Footnote continued—

> whether "used" means frequently used or used by someone in particular against whom enforcement may be aimed and whether "intended for use" means intended by its manufacturer, its seller or its ultimate possessor for use. . . .
>
> It is not the seller's intent that is at issue. If it were, then an item would not be drug paraphernalia unless the retailer intended that his customer use it unlawfully. It is plain that the retailer's intent is to sell the item. . . .
>
> . . . .
>
> The phrase "used or intended for use", that appears a dozen times renders the definition of drug paraphernalia unlawfully vague. It is impossible for any retailer to know whose use of whose intention he must be aware of. If it is "frequent" use, he can not tell how frequent it must be, or among what groups of people. If it is the customer's intention, then, before the customer arrives, the retailer can not tell if he is unlawfully stocking drug paraphernalia. The prior act of putting the item on his shelves would become unlawful only later, after the intentions of the yet unidentified customer are revealed.

36. Parma Ordinance § 620.01(dd)(1)(L); Lakewood Ordinance § 513.01(cc)(1)(L).

> paraphernalia"] from proof by the prosecutor of the basic one [*i.e.*, sale or possession of an item listed in the Ordinances as a common item of "drug paraphernalia"] and that places no burden of any kind on the defendant.

County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979) (bracketed language added). *Accord, Hammontree v. Phelps*, 605 F.2d 1371, 1374-75 (5th Cir. 1979).

A permissive inference violates due process unless it can be said with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 442 U.S. at 165-66 & n.28. *See also Barnes v. United States*, 412 U.S. 837, 842, 843 (1973); *Leary v. United States*, 395 U.S. 6 (1969); *McInerney v. Berman*, 473 F. Supp. 187, 188 (D. Mass. 1979), *aff'd*, 621 F.2d 20 (1st Cir.), *cert. denied*, 101 S.Ct. 201, 66 L. Ed. 2d 85 (1980).

The inferences permitted under the Ordinances by listing common forms of "drug paraphernalia" violate due process.[37] As the evidence introduced at trial and discussed above clearly demonstrates, there are no unique design characteristics distinguishing lawful items from "drug paraphernalia." Items listed in the Ordinances include, for instance, "roach clips," which are defined as any objects which can be used to hold the short end of a burning marijuana cigarette, such as electricians' alligator clips or tweezers, and "miniature cocaine spoons," which include any small spoons, such as McDonald's coffee stirrers and salt cellars. Slip Op. at 30. Certainly it cannot be said

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37. As is evident from the language of the Ordinances, only those items listed in subparagraph (L) of Sections 620.01(dd)(1) and 513.01(cc)(1) raise permissive inferences. By equating items not listed in subparagraph (L) with items listed therein, the Cities apparently fail to understand the distinction between items listed in subparagraph (L) and other subparagraphs of Sections 620.01(dd)(1) and 513.01(cc)(1) of the Ordinances. Jurisdictional Statement at 16.

with substantial assurance that a vendor more likely than not is selling items which will be used in drug-related activities merely from proof of sales of small spoons and tweezers. As the Sixth Circuit correctly stated, "[B]ecause the objects have many lawful uses, and because the design characteristics do not distinguish objects intended for lawful use from objects intended for unlawful uses, the object by itself does not provide any basis for an inference of its intended use." Slip Op. at 31. Therefore, the permissive inferences created by listing in the Ordinances common forms of "drug paraphernalia" clearly violate due process. *See County Court of Ulster County.*

The Ordinances also list various factors which law enforcement officers, judges and juries are instructed to consider in determining the guilt of an individual.[38] Most of those factors permit the guilt of an accused to be inferred from circumstances outside the control of the accused. Therefore, those factors create permissive inferences in violation of due process standards. There is not a sufficient connection between proof of those factors and the guilt of the accused so as to satisfy requirements of due process. *E.g., General Stores, Inc. v. City of Albuquerque,* slip op. at 5-6, 7; *Weiler v. Carpenter,* slip op. at 12-13; *Lazy, J., Ltd. v. The Borough of State College,* slip op. at 8-9.

The constitutional defects present in the aforesaid listing of circumstantial factors were well described by the Sixth Circuit:

> A . . . flaw in the list of "logically relevant factors" is the potential arrest, prosecution, or conviction of a person on the impermissible theory of guilt by association. *See Templeton v. United States,* 151 F.2d 706 (6th Cir. 1945). The factors include the proximity in time and space to a direct violation of the drug laws or

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38. Parma Ordinance §§ 620.01(dd)(2)(A)-(N); Lakewood Ordinance §§ 513.01(cc)(2)(A)-(M), as amended.

> to the presence of controlled substances, the statements of others, and the advertising of others. Thus, a retailer, for example, to avoid arrest, prosecution, or conviction, must continuously police the national and local media and the activities and statements of persons in the area of his store. The retailer could be safe from arrest on Monday morning when no one congregated near his store or the local narcotics dealer was on the other side of town, yet be very susceptible to arrest Monday afternoon when, unknown to the retailer, the narcotics dealer arrived around the corner from his store, attracting a group of persons who bought marijuana or other controlled substances and then came into his retail store to buy rolling papers, alligator clips, or pipes. In short, the ordinances permit events beyond the control of the retail owner to determine his guilt. The danger is that the ordinances could be applied to make a crime out of constitutionally protected or innocent conduct because of the actions or statements by persons other than the defendant. It is well established that guilt must be based on personal action, statements, or knowledge, not on association with other persons suspected of criminal conduct. *Sawyer v. Sandstrom,* 615 F.2d 311, 316-17 (5th Cir. 1980).

Slip Op. at 31-32.[39] The Ordinances also permit, for example, guilt of a vendor to be inferred from proof that a high percentage of the vendor's sales are pipes or alligator

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39. The Cities assert that the Sixth Circuit, in considering the factors discussed above, dealt only with "hypothetical applications" and "marginal cases." Jurisdictional Statement at 16-17. However, the cases relied upon by the Cities do not support that position. *Id.* Indeed, it is difficult to conceive of constitutional applications of these circumstantial factors listed in the Ordinances.

clips[40] or from proof that the vendor had been convicted many years earlier of possession of marijuana.[41]

It cannot be said with substantial assurance that a vendor is selling items which will be used with controlled substances merely from proof of the various factors discussed above. Therefore, it is clear that the list of circumstantial factors in the Ordinances creates permissive inferences in violation of due process standards.

E. The Sixth Circuit Correctly Held that the Ordinances Impermissibly Penalize Speech Protected by the First Amendment to the Constitution.

The Ordinances prohibit advertising which promotes, in whole or in part, the use or sale of "drug paraphernalia." The Sixth Circuit correctly determined that the Ordinances violate protections guaranteed by the First Amendment,[42] applying the analysis set forth by this Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 351 (June 20, 1980):

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If

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40. Parma Ordinance § 620.01(dd)(2)(L); Lakewood Ordinance § 513.01(cc)(2)(k), as amended.

41. Parma Ordinance § 620.01(dd)(2)(B); Lakewood Ordinance § 513.01(cc)(2)(B).

42. The prohibition on advertising is also vague and overbroad for its use of the term "designed," as discussed above, and for its use of the criterion "reasonably should know." Slip Op. at 39 n.32. The Cities admit that the term "reasonably should know" is unconstitutional. Jurisdictional Statement at 6.

> both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

First, the Sixth Circuit properly determined that the advertising banned by the Ordinances does not concern only lawful activity:

> The ordinances forbid the use, sale, or manufacture of drug paraphernalia. Because the force of each ordinance stops at the city limits, the use, sale or manufacture of drug paraphernalia is unlawful only in Parma, Lakewood, and North Olmsted. Consequently, the ordinances may prohibit the placement of advertisements only within the city limits about "drug paraphernalia" available within the city limits. The ordinances, as now drafted, could infringe on protected speech in at least three different ways. First, the ordinances could be enforced against advertisers or publishers who place advertisements in printed media that circulates in other cities as well as Parma, Lakewood, and North Olmsted. Second, the ordinances could prevent the residents of these three cities from receiving information about the availability of items, defined by the ordinances as drug paraphernalia, in other cities that do not prohibit the use, sale or manufacture of those items. *Bigelow v. Virginia,* 421 U.S. 809, 824-25 (1975). Third, the ordinances use of the words "promote in part" may allow the ban of speech discussing the reform of drug laws or speech glorifying the drug culture. *See Amusement Devices Ass'n v. Ohio,* 443 F. Supp. at 1051 ("facilitate").

Slip Op. at 38-39.

Bigelow v. Virginia, 421 U.S. 809 (1975), involved circumstances very similar to those involved herein. The Court in *Bigelow* had before it a Virginia statute which prohibited dissemination of information encouraging or promoting abortions. An editor of the University of Virginia newspaper was convicted thereunder for printing an advertisement containing information about abortion services legally available in New York. This Court declared the Virginia statute unconstitutional and reversed the conviction, stating:

> The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that state. . . . Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the state conceded, . . . prosecute them for going there. . . . Virginia possessed no authority to regulate the services provided in New York . . . .

421 U.S. at 823-24. Contrary to the Cities' argument at page 10 of their Jurisdictional Statement, these cases do not present to the Court for review the question left open in footnote 14 in *Bigelow v. Virginia*, 421 U.S. 809, 828 n.14 (1975).[43] The ban of the Ordinances is as fatally broad as the Virginia statute, reaching advertisements promoting the sale of "drug paraphernalia" in communities other than

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43. This Court left open the following issue:

> We are not required to decide here what the First Amendment consequences would be if the Virginia advertisement promoted an activity in New York which was then illegal in New York. An example would be an advertisement announcing the availability of narcotics in New York City when the possession and sale of narcotics was proscribed in the State of New York.

421 U.S. at 828 n.14.

Parma and Lakewood, almost all of which legally permit the sale of items which Parma officials might consider to be "drug paraphernalia." The Sixth Circuit properly and precisely followed the lead of this Court and held that the Ordinances violated First Amendment protections.[44]

The Cities, in their Jurisdictional Statement, fail to address the holding of the Sixth Circuit that the Ordinances infringe on protected speech by flatly barring all advertisements which have as one purpose (of many potential purposes) the promotion of the sale of "drug paraphernalia." The Court's decision in *Bigelow* also clearly sustains this rationale underlying the Sixth Circuit's holding that the Ordinances penalize protected speech. The advertisement at issue in *Bigelow* had as its primary purpose the promotion of abortions, a commercial transaction. However, because the advertisement also contained "factual matter of clear 'public interest,' " the Court in *Bigelow* held that the statute unconstitutionally infringed protected speech.[45] *Accord, New York Times v. Sullivan,* 376 U.S. 254 (1964). Use of the words "promote in part" in the Ordinances certainly places a ban on speech containing "factual matters of public interest." Therefore, for this reason as well, the Sixth Circuit correctly found that the Ordinances penalize protected speech.

After determining that the Ordinances ban speech protected by the First Amendment, the Sixth Circuit then

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44. The Cities argue that the Sixth Circuit should have applied a "limiting construction" to the Ordinances. Jurisdictional Statement at 18. However, this Court, when faced in *Bigelow* with a statute, like the Ordinances, which failed to limit its curb on expression to its own geographical borders did not "rewrite" or "construe" that statute. For the reasons discussed in Part B, *supra*, the Sixth Circuit correctly refused the Cities' invitation to undertake judicial "legislation."

45. 421 U.S. at 822.

examined the remaining factors set forth by the Court in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York.* While the Sixth Circuit determined that the asserted regulatory interest of Parma and Lakewood in stopping drug abuse is substantial and that the Ordinances advance that interest, it properly held that the reach of the Ordinances is more extensive than necessary to serve that interest. The Sixth Circuit, therefore, correctly held the Ordinances violative of the First Amendment right of free speech.

CONCLUSION

The Ordinances violate the Ohio Constitution because they conflict with a statute recently enacted by the State of Ohio. Therefore, this appeal should be dismissed. In the alternative, the questions presented are so unsubstantial as not to warrant further argument; they have not been considered by any other United States Court of Appeals and the Ordinances materially differ from the Model Act. Moreover, the opinion of the Sixth Circuit is plainly correct. For these reasons, the judgment of the Sixth Circuit should be summarily affirmed.

Respectfully submitted,

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APPENDIX

Section 2925.14 of the Ohio Revised Code provides:

(A) As used in this section, "paraphernalia for the use of marihuana" means any instrument, device, article, or thing, whether or not of crude or extemporized manufacture or assembly, that is used or intended for use for any of the following:

(1) preparing marihuana for ingestion, inhalation, or other introduction into the human body;

(2) ingesting, inhaling, or otherwise introducing marihuana into the human body;

(3) enhancing the effect of marihuana upon the human body;

(4) testing the strength, effectiveness, or purity of marihuana.

(B) No person shall knowingly sell or offer to sell paraphernalia for the use of marihuana to any juvenile.

(C) The following are affirmative defenses to a charge under this section:

(1) The defendant is the parent, guardian, or custodian of the juvenile involved.

(2) The juvenile involved, at the time the paraphernalia for the use of marihuana was sold or offered for sale to him, was accompanied by his parent, guardian, or custodian who, with knowledge that the paraphernalia sold or offered for sale would be used or was intended for use

for a purpose set forth in division (A)(1), (2), (3), or (4) of this section, consented to the paraphernalia for the use of marihuana being sold or offered for sale to the juvenile.

(3) The juvenile involved exhibited to the defendant or his agent or employee a draft card, driver's license, birth certificate, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or older, and the person to whom the document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under eighteen years of age.

(D) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapter 3719., 4715., 4729., 4731., or 4741. of the Revised Code.

(E) Whoever violates this section is guilty of selling paraphernalia for the use of marihuana to juveniles, a misdemanor [*sic*] of the first degree.